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OFFICIAL EDITION

REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

MARCUS T. HUN, REPORTER.

VOLUME XCIII.

1904.

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YORKVILLE BANK v. ZELTNER B. CO. (No. 1).....	80 App. Div. 578 <i>Appeal dismissed:</i> 178 N. Y. 578.

The attention of the profession is called to the fact that the Court of Appeals in many cases decides an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 181 N. Y. 490.) — REP.

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DETERMINED IN THE

FOURTH DEPARTMENT

IN THE

APPELLATE DIVISION,

March, 1904.*

PIER BROTHERS, Appellant, v. GEORGE DOHENY and JACOB AMOS, as Administrators with the Will Annexed, etc., of LUCIUS GLEASON, Deceased, Respondents.

Sale on credit induced by false representations to a commercial agency — that the vendee intended to pay for the goods does not disprove fraud — when a finding that the vendee did not intend to pay for the goods is necessary.

Where the president and treasurer of a corporation makes false and fraudulent statements concerning the financial condition of the corporation to a commercial agency, with knowledge of their falsity, for the purpose of having such statements reported to the subscribers of the commercial agency and of securing credit from such subscribers, a subscriber of the commercial agency, who, in reliance upon such false and fraudulent statements reported to him by the agency, sells goods to such corporation on credit and is not paid therefor, may, although no false representations were made by the president of the corporation directly to him, rescind the sale of the goods on the ground of fraud.

The fact that the president of the corporation believed at the time of the purchase that the corporation could and would pay for the goods will not sustain a finding that no fraud was committed.

While a finding that the purchase was made with a design not to pay for the goods might be necessary where there were no false representations, but merely a failure to disclose a condition of insolvency, such a finding is not required where false representations are made and relied upon and damage results therefrom.

APPEAL by the plaintiff, Pier Brothers, from a judgment of the Supreme Court in favor of the defendants, entered in the office of

* The other cases of this term will be found in volume 92 App. Div.—[REP.]

the clerk of the county of Onondaga on the 20th day of July, 1903, upon the report of a referee, dismissing the complaint upon the merits.

Charles H. Searle, for the appellant.

Frank Hiscock and *A. H. Cowie*, for the respondents.

WILLIAMS, J.:

The judgment should be reversed and a new trial granted before another referee, with costs to appellant to abide event.

The action was brought to recover damages for the conversion of twenty-six bales of hops, of the value of \$1,121.

The hops were originally the property of the plaintiff. About November 1, 1892, they were sold and delivered to the Greenway Brewing Company, and while in the possession of that company they were levied upon by the sheriff of Onondaga county by virtue of an execution issued upon a judgment against the company in favor of the estate of Lucius Gleason, and were sold February 9, 1893, and bid in for the said estate. After the levy, and before the sale, the plaintiff claimed the hops as its property and demanded the same of the sheriff, who refused to surrender the same. The estate, with knowledge of the plaintiff's claim, received the hops under the purchase at the sheriff's sale and appropriated the same to its own use. It paid no cash for the hops, but applied the amount of the purchase price upon its execution. The plaintiff sold the hops to the brewing company upon credit, never received any part of the purchase price thereof, and its claim of title thereto was based upon the allegation that the purchase was induced by fraud and deceit practiced upon it by the brewing company, and by reason thereof no title to the hops passed from it to the brewing company under the sale and delivery thereof. The question litigated in the case was the alleged fraud and deceit. The referee found that there was no fraud or deceit, and that the title did, therefore, pass to the brewing company. This finding was erroneous and should not be sustained. Fraud and deceit were clearly established by the evidence, and the plaintiff was entitled to recover in the case.

The facts with reference to this issue were not in dispute, and as found by the referee or proven in the case were as follows:

The hops in question were part of seventy bales sold and deliv-

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ered at one time, the other forty-four bales having been consumed before the seizure of the property by the sheriff upon the execution. The brewing company was a corporation with 2,000 shares of stock of which 1,998 shares were held by John Greenway, the president and treasurer, 1 share by Lucius Gleason, vice-president, and 1 share by Benjamin F. Hull, secretary at the time of the sale of the hops. John Greenway was carrying on and managing the business. Plaintiff's New York manager through an agent made the sale of the hops, transacting the business with John Greenway. No representations were made by Greenway direct to the plaintiff or its manager or agent as to the condition or standing of the brewing company. The plaintiff instead of requiring any statement from Greenway or the company itself, called upon Bradstreet's Commercial Agency for a report as to the brewing company and received one and relied thereon in making the sale and delivery of the hops upon credit, instead of requiring cash to be paid therefor. The report furnished plaintiff by the Bradstreet agency was compiled from information received from Greenway himself, and from other sources and it contained suggestions by the agency itself. Its representative visited the brewery in June, 1892, and had an extended interview with Greenway with reference to the standing and condition of the brewing company and its property, assets and liabilities. Among other things he received from Greenway some figures taken from a trial balance purporting to show approximately the assets and liabilities of the company, as follows:

Estimated value of merchandise on hand..	\$100,000 00
Packages.....	64,661 56
Bills receivable.....	5,590 87
Accounts receivable.....	295,988 42
Teams.....	12,693 19
 Total assets	 \$528,934 04

Liabilities.

Bills payable.....	\$480,260 73
Bond and mortgage.....	6,950 59
	<hr/>
Balance.....	\$41,722 72

(These are the figures and footings as they appear in the record, but the footing of the assets is erroneous. It should be \$478,934.04, and the liabilities would then exceed the assets by the sum of \$8,277.28. I have endeavored to find out how this error occurred, whether in the printing or in the original statement, but I cannot do so.)

Greenway told the agency representative that the item of bills payable, \$480,260.73, represented Gleason's claims, for which he held security in the form of title to the real estate, and had been reduced to about \$380,000 from collecting their accounts receivable, and that he, Greenway, was then trying to negotiate a loan on the real estate to pay most, if not all, of Mr. Gleason's claim, and with this object in view had had an appraisal made of the value of all the buildings by two competent and conservative men, who were reliable, and their valuation of the buildings was \$545,940, and that in addition to the buildings the ground they stood on, having a frontage on Water street of 500 feet, was worth at least \$300 a foot, making the total value of the real estate about \$700,000, and these statements of Greenway with the figures were put in the report made to plaintiff. The agency also put into their report the following facts learned from other sources than Greenway or the brewing company: "The business was established many years ago by John Greenway, father of the above-mentioned Mr. Greenway. The company has always done a large business, but owing to losses by bad debts, &c., have not made any money of late years. At time of the senior Mr. Greenway's death the company was quite largely indebted for loans, the amount being about \$490,000 and was owing mainly to Mr. Gleason and one or two local banks; Mr. Gleason being secured by mortgage on the company's property. About eighteen months ago the property was sold on mortgage foreclosure, and bid in by Mr. Gleason, who now holds title to the brewery and other real estate owned by the company." The agency also put into its report the following facts learned in part from Gleason and Greenway, and in part from other sources: "He (Gleason) executed a contract soon after the purchase agreeing to reconvey the brewery property to Mr. Greenway upon his paying \$12,500 on the first day of April, 1891, and \$12,500 every three months thereafter until the whole of his debt is paid, with a pro-

viso that whenever the indebtedness to Mr. Gleason and the Third National Bank was reduced to \$250,000, Mr. Gleason is to execute a deed to him, and take back a mortgage as security for the balance." The report also contained statements of its own as follows: "Of course in the event of Mr. Gleason's debt being finally and fully paid, the property now owned by him becomes the property of Mr. Greenway, and would leave the company in very good condition, as its consummation would liquidate practically all of the company's liabilities. * * * Such an arrangement (raising of money on the real property to pay Gleason's debt) would place the company in very good condition, as their assets would not be reduced by it, and be the means of funding substantially all of their indebtedness, presumably at a moderate rate of interest and on long time. They ask very little if any credit except what they borrow, and there is apparently no doubt as to the company's property being sufficient to pay Mr. Gleason's claim without reference to the arrangement regarding the real estate. The plant is certainly valuable, and the business with good management should be successful."

The plaintiff received this report from the agency, relied upon it, believed it to be true, and was induced thereby to sell and deliver the hops on credit and without receiving cash down therefor. The statements made by Greenway and embodied in the report were made for the purpose of being disclosed to the subscribers of the agency and of being relied upon in dealing with the brewing company. The statements were grossly false and untrue, and were known to be so by Greenway when he made them. The item of assets was grossly exaggerated. The merchandise on hand, put at \$100,000, really amounted to only about \$82,000, and some of that had been transferred and was pledged for loans. The item packages, put at \$64,661.56, was really worth only about one-fifth of that amount, or \$15,000. The item of accounts receivable, put at \$295,988.42, contained one item of \$143,815.52, account against the senior John Greenway, which was entirely worthless and was put in judgment and assigned to Gleason in 1890, so that the brewing company did not own it at all when this statement was made. The county and city accounts included in this item, amounting to about \$73,000, were mostly old and stale. The bottling account included in this item, \$72,512.57, was a nominal account, represent-

ing a branch of the business, and was of little or no value. The item Greenway estate, \$6,510.62, was of no value. The item teams, \$12,693.19, was exaggerated and made up by charging to it all expenses incurred therefor. This is the uncontradicted condition of this statement as to the assets, largely founded upon the evidence of Greenway given on the trial. The liabilities are mostly made up of bills payable, \$480,260.73. As a matter of fact this item could not be regarded as bills payable at all. It covered four judgments, amounting to \$438,832.87, standing against the brewing company, but the original indebtedness for which the judgments had been covered was still carried on the company's books, and it was, therefore, put into this item as bills payable. Nothing was said by Greenway to the agency's representative about any judgments against the company, and nothing was contained in the agency's report to the plaintiff. The statement made by Greenway and included in the report to plaintiff, that this item of accounts payable had been reduced to about \$380,000, that is, \$100,000 had been paid upon it from collecting accounts receivable was wholly false and untrue. In short, without going into further details, these statements by Greenway to the agent, which were communicated to the plaintiff, were grossly false and untrue and were well known to Greenway to be so when he made the same, and yet in the face of these facts the referee found that in making the statements Greenway *did not intend to deceive, cheat or defraud the plaintiff or others who in reliance thereon should deal with the company.* The idea of the referee in making such a finding is apparent from the additional finding that Greenway *believed the company could safely continue business and pay for its purchases, and did not intend to obtain possession of the plaintiff's hops without paying for them.* That is, there was no intent to deceive or defraud because he believed the company could pay for the hops, and did not intend *not* to do so. There can be no doubt but that he made the statements for the purpose of establishing a credit with those who might deal with the company, and that the statements were communicated to the plaintiff, and it was thereby induced to give the ninety days' credit, relying on the truth of the statements. It follows, therefore, as a matter of course, that Greenway intended to deceive the plaintiff and thereby secure its property on credit, and such deceit resulted

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in damage to the plaintiff to the extent of the value of its hops sold and delivered.

That was a fraud upon the plaintiff whether Greenway *believed* the property could be paid for or not; whether he intended it should be paid for or not. It was not necessary to find that the purchase was made with a design not to pay for the property in order to render the company liable. While such a finding might be necessary where there were no representations, but merely a condition of insolvency, and a failure to disclose it, nothing of that kind is required when false representations are made and relied upon and damages result therefrom. (*Morris v. Talcott*, 96 N. Y. 100; *Phoenix Iron Co. v. Hopatcong & Musconetcong*, 127 id. 206; *Hotchkiss v. Third National Bank*, Id. 329; *Harrisburg Pipe Bending Co. v. Welsh*, 26 App. Div. 515.)

It is well settled that fraud may be predicated upon false and fraudulent statements made by a person, firm or corporation to a commercial agency for the purpose of obtaining a favorable standing with such agency, to be reported to its subscribers, and a subscriber to such agency, who relies upon such statements and standing reported to it by the agency, and sells goods on credit, which are not paid for, may maintain an action in fraud, though no fraudulent statements were made directly by the debtor to such subscriber. (*Tindle v. Burkett*, 171 N. Y. 520, and the cases therein referred to.)

Some question is raised as to whether upon the evidence here it could be said that the plaintiff relied upon the false statements of Greenway reported to it by the agency in making the sale; whether those statements were an inducing cause of giving the ninety days' credit. Mr. Fingar, manager of plaintiff's New York office, who was its credit man, made the sale, that is, he received the offer and on behalf of the plaintiff directed its acceptance and the delivery of the hops. Before doing so he applied to the agency for a report upon the brewing company and secured the report in question. The plaintiff never had any previous business transaction with the brewing company and knew nothing about its condition or standing. Mr. Fingar testified before the referee that he relied absolutely upon that report; that there was a balance by the trial balance of assets over liabilities of \$41,000, and there had been paid during the year

\$100,000 on the liabilities, and that the liabilities were secured by real estate outside the assets shown by the trial balance figures, and he stated further that if he had known that there were judgments against the company for \$30,000 and \$96,000 he would not have given them any credit.

It will be remembered that nothing whatever was contained in the report showing any judgments existed against the brewing company. The liabilities were not stated to include judgments, but were stated to be bills payable and a small bond and mortgage. An effort was made on the trial to show that Greenway told the agency's representative about the judgments, but no such evidence was secured. Mr. Smith, the agency's representative, testified nothing was said about a deficiency judgment, but only a foreclosure judgment upon which the real estate was sold. It does not appear that the agency at the time the representations were made to it in 1892 had any knowledge of the judgments as then existing. Mr. Smith said he supposed his agency knew of the recovery of the judgments in 1890 from the clerk's office reports to them, but he was assured by Greenway in 1892 that the only liabilities then existing were bills payable and a small bond and mortgage, and that the bills payable covered Mr. Gleason's claims which were secured by the title to the real estate vested in him. He said he knew judgments *had been* obtained, but did not know they remained then unsatisfied, and he understood from the talk with Greenway that the new arrangement when the real property was sold and title vested in Gleason in 1890 superseded the old arrangements, and the land was thereafter the security for Gleason and the bank's claims. It cannot be said, therefore, that the agency in 1892, when Greenway made the statement in question, knew of the existence of unsatisfied judgments against the brewing company, and it is not, therefore, necessary to consider what legal consequences would result if it had such knowledge; whether its knowledge would be imputable to the plaintiff, and whether upon the evidence of Mr. Fingar, in that event there would be a failure to show reliance upon the report from the agency sufficient to maintain the action.

We conclude that fraud was established in this case and the finding of the referee that there was no such fraud was contrary to the evidence, and that plaintiff's right to recover was beyond question.

Therefore, the judgment appealed from should be reversed and a new trial granted, as already stated.

All concurred; Hiscock, J., in result only.

Judgment reversed and new trial ordered, with costs to the appellant to abide the event, upon questions of law and of fact.

FLORENCE E. FITCHARD, Appellant, v. GEORGE DOHENY and JACOB AMOS, as Administrators with the Will Annexed, etc., of LUCIUS GLEASON, Deceased, Respondents.

Sale of goods on credit induced by false representations—the fact that the vendee believed on reasonable grounds that he could pay for the goods does not disprove fraud—when a finding that the vendee did not intend to pay for the goods is immaterial.

A person who sells goods to a corporation upon credit, in reliance upon false and fraudulent statements concerning the financial condition of the corporation, made to him by the president and treasurer of the corporation with knowledge that such representations were false, may, if he does not receive payment for the goods at the expiration of the term of credit, rescind the sale upon the ground of fraud.

The fact that the president of the corporation believed, and had reasonable grounds for such belief, that the corporation would pay for such goods when the term of credit expired, will not sustain a finding that no fraud was committed. While a finding that the purchase was made with the intention not to pay for the goods might be necessary where there were no false representations, but merely a failure to disclose a condition of insolvency, such a finding is not required where false representations are made and relied upon and damage results therefrom.

APPEAL by the plaintiff, Florence E. Fitchard, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Onondaga on the 20th day of July, 1903, upon the report of a referee, dismissing the complaint upon the merits.

Charles H. Searle, for the appellant.

Frank Hiscock and *A. H. Cowie* for the respondents.

WILLIAMS, J.:

The judgment should be reversed and a new trial granted before another referee, with costs to appellant to abide event.

The action was brought to recover damages for the conversion of twenty bales of hops of the value of \$1,000.

The hops were originally the property of the plaintiff; about November 1, 1892, they were sold and delivered to the Greenway Brewing Company, and while in the possession of that company they were levied upon by the sheriff of Onondaga county by virtue of an execution issued upon a judgment against the company in favor of the estate of Lucius Gleason, and were sold February 9, 1893, and bid in for the said estate. After the levy and before the sale, the plaintiff claimed the hops as her property, and demanded the same of the sheriff, who refused to surrender them. The estate, with knowledge of the plaintiff's claim, received the hops under its purchase at sheriff's sale and appropriated the same to its own use. It paid no cash for the hops but applied the amount of the purchase price upon its execution. The plaintiff sold the hops to the brewing company upon credit; never received any part of the purchase price thereof, and her claim of title thereto was based upon the allegation that the purchase was induced by fraud and deceit practiced upon her by the brewing company and by reason thereof no title to the hops passed from her to the brewing company under the sale and delivery thereof. The question litigated in the case was the alleged fraud and deceit. The referee found that there was no fraud or deceit, and that title *did*, therefore, pass to the brewing company. This finding was erroneous, and should not be sustained. Fraud and deceit were clearly established by the evidence and the plaintiff was entitled to recover in the case.

The facts with reference to this issue were not in dispute, and as found by the referee or proven in the case, were as follows:

The hops in question were part of thirty-five bales sold and delivered at one time, the other fifteen bales having been consumed before the seizure of the property by the sheriff upon the execution. The brewing company was a corporation with 2,000 shares of stock, of which 1,998 shares were held by John Greenway, the president and treasurer, 1 share by Lucius Gleason, vice-president, and 1 share by Benjamin F. Hull, secretary. At the time of the sale of the hops, John Greenway was carrying on and managing the business. Plaintiff's husband and agent made the sale of the hops, transacting the business with John Greenway. Plaintiff's agent

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asked Greenway about the pay for the hops, and Greenway said he would give a note for ninety days, and plaintiff could get the money on it at any bank in Syracuse; that the company's bills were always paid when due; that the company was perfectly responsible for all goods it bought, and its paper was as good as money; that it had 40,000 pounds of extract on hand, worth two dollars and twenty-five cents to two dollars and fifty cents per pound, owned it, and it was paid for; that the company owned all the real estate and a good deal of other property, and its property was worth a great deal more than the company owed, and the company was in good shape.

The plaintiff relied upon these representations, believed them to be true, and was induced thereby to sell and deliver the hops upon a credit of ninety days and to take the company's note for the purchase price, payable February 1, 1893, instead of requiring cash to be paid therefor. The statements so made were grossly false and untrue, and were known by Greenway to be so when he made the same.

Gleason, the vice-president of the brewing company, was president of the Third National Bank of Syracuse from 1889 until he died, January 3, 1893. Both Gleason and his bank had business relations with the brewing company for many years. In 1890 Gleason held a mortgage upon the brewing company's real property, which he foreclosed, and the property was sold on September fourth of that year, and bid in by Gleason, and judgments taken for deficiency against the company for over \$90,000. The bank also recovered a judgment against the brewing company during that year for an indebtedness of over \$30,000. September 4, 1890, an agreement was made between Gleason and John Greenway wherein it was recited that the brewing company was indebted to Gleason in the sum of \$444,000 and to the bank in the sum of \$46,000, and wherein it was agreed Gleason would sell to Greenway the real property covered by the mortgage and bid in under the foreclosure sale for the amount owing by the brewing company to Gleason and the bank, and all costs and expenses of the foreclosure of the mortgages and the procuring of the judgments by Gleason and the bank, less anything that might be realized by a sale of any personal property of the brewing company upon executions issued upon such judgments, the payments by Greenway to be made as follows:

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Interest on the whole amount quarterly at six per cent and principal, \$12,500, on April 1, 1891, and the same amount every three months thereafter until the whole principal sum should be paid, and whenever the principal should be reduced to \$250,000 a deed should be made and a mortgage given back for the balance of the purchase price unpaid. There were other provisions in the agreement as to details, which are unimportant to refer to here. It was provided that upon default being made in any payments of principal or interest by Greenway, Gleason should have the right to forfeit the agreement and to take and hold possession of the real property. At the time the hops in question were purchased of the plaintiff Greenway had made substantially no payments under this agreement, so that the condition of things then was this: The brewing company had no interest whatever in the real property. All its title had passed to Gleason under the foreclosure, and he and the bank had judgments against the brewing company for over \$130,000, and could issue executions upon the judgments whenever they desired and levy upon and sell the personal property of the company. It was contemplated by the agreement between Gleason and Greenway that they might and would do this, and Greenway would have the benefit of the personal property so sold in reduction of the purchase price he had agreed to pay Gleason for the real property. There was no provision for redeeding the real property to the brewing company in any event. It is difficult to determine from the evidence what personal property the company had at the time the hops were purchased liable to sale under the executions. It is not necessary to go into details. There certainly was not enough to satisfy the judgments against the company, and the referee has found and counsel on the trial before the referee and on the argument here conceded that the company was at the time the hops were sold, and had been for a long time prior thereto, insolvent and unable to pay its debts. It was in a bad condition financially, wholly irresponsible and unable to meet its obligations. It will be seen without the statement of further details that the representations made by Greenway to the plaintiff's agents were, as above stated, grossly false and untrue, and were well known by Greenway to be so when he made them.

In the face of these well-established facts the referee found that

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Greenway, when he made the statements, *did not intend to deceive or defraud the plaintiff*. The idea of the referee, in making such a finding, is apparent from a subsequent finding that Greenway did not intend to *acquire or obtain possession of the hops without paying for them when the term of credit expired, and he then had reasonable grounds to believe that the hops would be paid for*.

That is, there was no intent to defraud or deceive because he *believed* upon reasonable grounds that the hops would be paid for when the term of credit expired. There can be no doubt that he made the false statements for the purpose of securing the ninety days' credit instead of paying cash for the hops, and that the plaintiff was induced to part with her property on credit in reliance upon the truth of such statements. It follows, therefore, as a matter of course that Greenway intended to, and did, deceive the plaintiff and thereby to secure the property on credit and such deceit resulted in damage to the plaintiff to the extent of the value of the hops sold and delivered. That was a fraud upon the plaintiff whether Greenway believed the property would be paid for or not. It was not necessary that it should be found by the referee that he intended not to pay for it. While such a finding might be necessary where there were no representations, but merely a condition of insolvency and a failure to disclose it, nothing of that kind is required where false representations are made and relied on and damages result therefrom. (*Morris v. Talcott*, 96 N. Y. 100; *Phoenix Iron Co. v. Hopatcong & Musconetcong*, 127 id. 206; *Hotchkin v. Third National Bank*, Id. 329; *Harrisburg Pipe Bending Co. v. Welsh*, 26 App. Div. 515.)

We conclude, therefore, that fraud was established in this case and the finding by the referee that there was no such fraud was contrary to the evidence, and that plaintiff's right to recover was beyond question.

Therefore, the judgment appealed from should be reversed and a new trial granted as already stated.

All concurred; Hiscock, J., in result only.

Judgment reversed and new trial ordered, with costs to the appellant to abide event upon questions of law and of fact.

SOPHIA WAGNER, as Administratrix, etc., of NICHOLAS WAGNER, Deceased, Respondent, v. THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Appellant.

Negligence — servant killed by a derrick car falling from a bridge, because of a failure to anchor it — the master, who supplied ropes for anchoring purposes, is not liable because he failed to furnish a chain and turn-buckles for those purposes — contributory negligence — assumed risks.

In an action brought to recover damages resulting from the death of the plaintiff's intestate it appeared that the latter was employed by the defendant as a craneman on a derrick car, which was standing on a bridge and was being used in hoisting stone from a ravine below; that while a stone was being hoisted, the car, owing to a failure to anchor it to the bridge, fell over into the ravine and the intestate was killed.

A turn-buckle and chain, which had previously been used to anchor the car were not in the car at the time of the accident, but it was supplied with ropes suitable for anchoring purposes. The intestate was an experienced workman, who had been employed on the derrick car for a week previous to the accident, and the evidence tended to establish that he had talked with a fellow-workman about the necessity of anchoring the car just before the accident occurred.

Held, that liability on the part of the defendant could not be predicated upon the fact that a turn-buckle and chain were not in the car on the occasion of the accident;

That the intestate was guilty of contributory negligence, and that he assumed the risk of the accident.

APPEAL by the defendant, The New York, Chicago and St. Louis Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Chautauqua on the 5th day of May, 1903, upon the verdict of a jury for \$5,000, and also from an order entered in said clerk's office on the 5th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Rogers, Locke & Milburn and Louis L. Babcock, for the appellant.

George E. Towne and W. S. Thrasher, for the respondent.

WILLIAMS, J.:

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide event.

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The action was brought to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence of the defendant.

The defenses were that the defendant was not guilty of the negligence which caused the accident and death, that the intestate was not free from negligence, and that he assumed the risk of the accident which resulted in his death.

The intestate was cranesman upon a derrick car standing on a bridge, and with other employees of the defendant was engaged in hoisting stone from a ravine below and loading them upon a gondola car. The derrick car was not anchored and while raising a stone the car toppled over into the ravine below and the intestate was killed.

The action was first tried in 1902 and a verdict was rendered in favor of the plaintiff upon the ground that the defendant was guilty of negligence in not having a proper appliance upon the derrick car for controlling the swing of the boom of the derrick by which the stone was being raised, and also in not promulgating rules for anchoring the car to the track and thus preventing it from being tipped over. Upon appeal to this court we reversed the judgment entered upon that verdict and ordered a new trial (76 App. Div. 552), holding that there was no evidence which entitled the plaintiff to have the *first* ground of negligence above submitted to the jury, and that the *second* ground was not set forth in the complaint, and that there was no evidence entitling the plaintiff to submit that question to the jury, if properly alleged in the complaint. There was apparently no controversy upon that trial as to the presence in the car of adequate appliances for anchoring the same.

Upon a second trial (the result of which is now here for review) the plaintiff secured a verdict from a jury upon the ground that the defendant was negligent in not furnishing suitable and sufficient appliances for anchoring the car. The evidence was conflicting as to the presence in the car of a turn-buckle, and the jury have apparently found no such appliance was there. The parties agreed that there *was* a chain in the car suitable for anchoring the same when the work was undertaken, but before the accident occurred that chain had been taken into the ravine and was being used about

the stones as they were raised. There were concededly in the car all the time the work was being done and at the time of the accident two ropes, one an old hoist rope one hundred feet long, somewhat worn and no longer suitable for use as a hoist rope, and also a manilla inch line over one hundred feet long in good condition, and some other short pieces of rope. The verdict, therefore, must have been based upon the proposition that the accident and death resulted from the failure or neglect to have a turn-buckle and chain in the car, although these ropes *were* there. In other words, that the ropes alone were not suitable or sufficient appliances for anchoring the car. The verdict upon this ground was contrary to the evidence, against the weight of the evidence. There was a hook upon the car under the platform only three or four feet from the rail of the track, and the bridge structure was just below. A chain would have been more convenient to apply and a turn-buckle would have enabled the men to draw the chain closer and make it more rigid, but that it was possible to anchor the car without either a chain or turn-buckle by the use of ropes, and that it was easy to do so cannot be doubted. Evidence was given upon the trial that it could be so done, and that it was so done when a chain and turn-buckle were not at hand. This was not disputed and could not well be. The car on this occasion stood over the bridge. The ropes could have been passed over the hook upon the car and drawn closely about the rails, ties or bridge structure below. It was but a short distance, four to five feet. The ropes in the car were entirely sufficient to securely hold the car in place, so that this accident would not have occurred. The hoist rope, though somewhat worn, and, therefore, not strong enough to use for hoisting where the strain would be for a considerable portion of its length, was not shown to be inadequate to bear the strain upon a few feet of its length, especially if it was doubled or trebled in anchoring the car. The other rope, one inch in diameter, was concededly in perfect condition and could have been many times doubled so as to securely hold the car from toppling over into the ravine below. The car remained in its place without any anchoring, while other stones were being raised and while the stone which tipped the car over was raised a part of the way. It would apparently have required no very strong fastening of the car to have counteracted

the weight of the stone and have kept the car in its place. Under this undisputed condition of things a verdict should not be upheld, based upon such a finding of negligence. The accident was certainly the result of failure to have the car anchored when the stone in question was attempted to be raised, and we are unable to see how the defendant was responsible for such neglect. The court, upon the last trial, charged the jury that there was no evidence that there was any defective condition of the engine, car or any of the machinery used in doing the work; that the only cause of the accident was the failure to anchor the car; that the anchoring of the car was a detail properly intrusted to the men engaged in the work, and that the men doing the work were co-employees of the intestate, for whose negligence plaintiff could not recover. The evidence shows that the intestate and the other men engaged in this work were experienced in such kind of work; the intestate was a bridge builder, and had been in the defendant's employ for nearly ten years, having worked upon nearly every bridge upon the line of its road. This derrick car had been loaned by the defendant to the bridge company that was building the bridge where the accident occurred, and had been operated for nearly a week just prior to the accident in their work, the intestate operating the crane all that time, and the car was anchored during the time the bridge company was using it, and the intestate and another workman did the anchoring every day; a turn-buckle with a chain was then in use. It belonged to the bridge company and it does not appear that it was not about the work, though the jury have found none was in the car. These men, we must assume, could easily have obtained a chain for anchoring purposes if they regarded anchoring necessary. Chains are not so uncommon that their mere absence from the car could excuse the men from anchoring the car. The theory of the plaintiff must be that these men would have used the appliance and anchored the car if such appliances had been handy near by in the car, but inasmuch as they were not within easy reach these experienced men sent out to do this work, intrusted with its detail, could not be expected to look about and get a chain or turn-buckle, but to proceed in the dangerous way they did, and, therefore, the neglect that caused the accident and

death was that of the defendant itself in not having a chain and turn-buckle handy near by, right in the car.

We do not regard this as a fair ground upon which to base a recovery in the case. But assume the plaintiff can escape this difficulty, what are we to say about the questions of contributory negligence and assumed risk? We have already referred to the position of the intestate, his knowledge and experience in this kind of work. How could the jury fail to conclude that he knew and understood the need, the necessity, for anchoring the car in doing the work they were engaged in, the danger to be apprehended in doing the work without anchoring the car? The evidence tends to establish that he knew and understood as well as the defendant could the whole situation, and more than this, that he and the engineer talked about the need of anchoring the car just before the accident occurred, at a time when he might have left the car and refused to work further until such anchoring was done, until in fact he had done it himself, but inasmuch as the chain and perhaps the turn-buckle were not in the car, that he went on with the work with full knowledge of the danger to himself and the other workmen, and that he was negligent and careless himself, yes, recklessly so, and yet it is said the defendant should respond in damages for his death, a death resulting from his alleged carelessness, and the risk of which death it is alleged he voluntarily assumed.

The verdict can only be sustained upon the theory that the jury found the deceased was free from negligence and did not assume the risk. Both of these findings would be contrary to the evidence, against the evidence in the case.

Our conclusion, therefore, is that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide event.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event upon questions of law and of fact.

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In the Matter of the Application of the LYONS CEMETERY ASSOCIATION, Respondent, to Acquire Title to Certain Real Estate Owned and Possessed by AMELIA SMAERT, Appellant.

Rural cemetery association—section 45 of the Membership Corporations Law authorising it to acquire additional land by condemnation proceedings is constitutional—that the parcel sought to be acquired is separated from the original cemetery by a public highway is not an objection—compliance with the requirements as to maps, surveys and schedules of prices.

Section 45 of the Membership Corporations Law (Laws of 1895, chap. 559, as amd. by Laws of 1898, chap. 326), providing, "If the certificate of incorporation or by-laws of a cemetery corporation do not exclude any person from the privilege on equal terms with other persons of purchasing a lot or of burial in its cemetery, such corporation may from time to time acquire by condemnation exclusively for the purposes of a cemetery, not more than two hundred acres of land in the aggregate forming one continuous tract, wholly or partly within the county in which its certificate of incorporation is recorded" is constitutional, as the use for which the lands are taken is a public use rather than a private one.

The fact that the dividing line between the lands composing the original cemetery and the lands intended to be taken by eminent domain is the center of a public highway separating the two parcels, does not establish that the two parcels do not form one continuous tract within the meaning of the statute.

The requirements of sections 46 and 49 of the Membership Corporations Law as to maps, surveys and schedules of prices need not be complied with until the corporation acquires the title to the land which it desires to condemn.

STOVER, J., dissented.

APPEAL by Amelia Smart from a judgment of the Supreme Court in favor of the petitioner, entered in the office of the clerk of the county of Wayne on the 20th day of July, 1903, upon the report of a referee.

E. W. Hamm and C. W. Knapp, for the appellant.

B. Wynkoop and Frank Rice, for the respondent.

WILLIAMS, J.:

The judgment should be affirmed, with costs. The proceeding was commenced by the Lyons Cemetery Association to acquire title to real estate owned by Amelia Smart.

The cemetery association was organized in 1847 under chapter

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133 of the laws of that year for the incorporation of rural cemetery associations. All except section 10 of the act of 1847 was repealed by the Membership Corporations Law (Laws of 1895, chap. 559), and the substance of the act of 1847 and that of several amendatory statutes also repealed by the Membership Corporations Law were re-enacted by that law. Under section 32 of the Statutory Construction Law (Laws of 1892, chap. 677, as amd. by Laws of 1894, chap. 448), the rights, obligations and liabilities of this cemetery association are to be determined by the Membership Corporations Law and the statutes as to rural cemetery associations remaining unrepealed.

Chapter 452 of the Laws of 1873 (amdg. Laws of 1870, chap. 760), provided for the taking of lands for the purpose of rural cemetery associations in the exercise of the right of eminent domain as for a public use, and the Court of Appeals held that under the statutes as they then existed relating to such associations, the use was not a public, but a private one. (*Matter of Deansville Cemetery Association*, 66 N. Y. 569.) The court, in discussing the question of use, said in that case: "It (the land to be taken) is to be vested in trustees, with power to divide into lots and sell these lots to individual owners. It is difficult to see what interest the public will have in the lands or in their use. No right on the part of the public to buy lots or bury their dead there is secured. The prices at which the lots are to be sold are to be fixed by private agreement; the corporation is to be managed by trustees elected by the lot owners. The lots, or the rights of the owners therein, are to descend as private property to the heirs of these owners; and by the act of 1874* the owners may, by leave of the courts, sell their lots and put the proceeds in their pockets. The substantial right of enjoyment of the property is vested in the individual lot owners, and the whole effect of the incorporation of these cemetery associations is to enable a number of private individuals to unite in purchasing property for their own use and that of their descendants as a place of burial and to secure a permanent management of it through the instrumentality of trustees appointed by themselves, and subject to no other control, with the privilege, when they cease to use

* See chap. 245.—[REP.]

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their lots as a place of burial, to sell them and receive the proceeds for their own benefit. It is argued that the property is to be used as a place of burial and that the burial of the dead is a public benefit, and therefore, the use is public. But the answer to this argument is, that the right of burial in these grounds is not vested in the public or in the public authorities, or subject to their control, but only in the individual lot owners," etc. An attempt was made by certain provisions of the Membership Corporations Law to make the use of the lands to be taken a public, instead of a private one, and so render the statute of 1870 (*supra*, as amd. by Laws of 1892, chap. 518), permitting the taking of the land in the exercise of the right of eminent domain, constitutional and valid. These provisions are contained in sections 45, 46 and 49 of the act and are as follows:

"§ 45. Acquisition of property.— If the certificate of incorporation or by-laws of a cemetery corporation do not exclude any person from the privilege on equal terms with other persons of purchasing a lot or of burial in its cemetery, such corporation may from time to time acquire by condemnation exclusively for the purposes of a cemetery, not more than two hundred acres of land in the aggregate, forming one continuous tract, wholly or partly within the county in which its certificate of incorporation is recorded, except as in this article otherwise provided." (As amd. by Laws of 1896, chap. 325.)

"§ 46. Surveys and maps of cemetery.— Every cemetery corporation shall from time to time as land in its cemetery may be required for burial purposes, survey and subdivide such land into lots or plats, with avenues, paths, alleys, walks and ornamental plats; and make and file a map thereof in the office of the corporation, open to the inspection of all persons."

"§ 49. Title and rights of lot owners.— The directors must fix and determine the prices of the burial lots or plats, and keep a plainly printed copy of the schedule of such prices publicly posted in the principal office of the corporation, open at all reasonable times to the inspection of all persons. The corporation unless its certificate of incorporation or by-laws otherwise provide shall subject to its rules and regulations sell and convey to any person the use of the lots or plats, designated on the map filed in the office of the corporation, on payment of the prices so fixed and

determined, but need not sell and convey more than one lot or plat to one person."

These provisions seem to obviate the objections to the statutes of 1870 and 1847 and their amendments, and to make the use of the lands to be taken a public rather than a private one, so as to permit the taking of land in the exercise of eminent domain. An association within the terms of these provisions of the Membership Corporations Law is public in the sense that it is open to all persons alike to purchase lots or plots for burial purposes at the same price. They are beneficial to the public, and the public is entitled to share in such benefits without any preference whatever to individuals.

Mr. Justice WARD expressed the opinion that these provisions were constitutional and authorized associations within such provisions to take lands thereunder; that the use was a public one (*Stannards Corners Association v. Brandes*, 14 Misc. Rep. 270); and in *Matter of Burns* (155 N. Y. 23) it was held that "so long as the intended use of an improvement, sought to be accomplished through an exercise of the right of eminent domain, is not restricted to private parties or private interests, but is open to the whole public, it is no valid objection to the act authorizing it that it will benefit one person or some class of persons more than others, or that it originated in private interests and was intended in some degree to subserve private purposes." That case related to an act making a stream a public highway.

And in *Pocantico Water Works Co. v. Bird* (130 N. Y. 249) it was held that "the Legislature may vest a private person or corporation with the right of eminent domain, when the use to be made thereof is to acquire property for the public benefit. In order to make the use public, a duty must devolve upon the person or corporation to furnish the public with the use intended. This use may be limited to the inhabitants of a small or restricted locality, but it must be to those inhabitants in common, and not for a particular individual." That case related to acts for the erection of water works to supply three villages with pure and wholesome water. Under the rules laid down in these two cases and the cases therein referred to, we think the use here was a public and not a private one. The cemetery association here was concededly within these provisions of the Membership Corporations Law. The original

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cemetery is about eight acres in extent, is substantially all occupied, and the addition proposed of about eight acres more is urgently needed. The public would be greatly benefited by the enlargement of the cemetery and the general public would share in the benefit without preference of one individual over another. We do not regard the objection that the provisions in question are unconstitutional as well taken.

The requirements of sections 46 and 49 of the Membership Corporations Law as to maps, surveys and schedule of prices cannot well be complied with until title to the land in question is acquired. There are no lots or plots in the original cemetery to sell, and the new land cannot be plotted and prices of lots fixed until the same is annexed to the old cemetery. The statute (§§ 46, 49) requires these things to be done whenever lands of the association are required for burial purposes and not before. The lands proposed to be taken are adjoining the lands of the cemetery and the two pieces, therefore, constitute a continuous tract, but the line between them is the center of a public highway and, therefore, it is claimed that the tract is not a continuous one within the meaning of section 45 of the statute, as the lands within the boundaries of the highway cannot be used for burial purposes. The approach to the cemetery must be over this highway and in laying out the lands there must be avenues, paths, alleys and walks (§ 46, *supra*). We see no reason why this highway may not serve the purpose of an avenue in plotting the land for cemetery purposes, and the lands on either side could then be laid out into lots up to the margin of the highway.

There is no necessity for giving the statute any such construction as contended for by the appellant, requiring the court to hold that these two pieces of land do not constitute a continuous tract, when they are so in fact, merely because of the public highway over and across the same.

There are no other questions calling for discussion.

The judgment appealed from should be affirmed, with costs.

All concurred, except STOVER, J., dissenting.

Judgment affirmed, with costs.

JAMES P. FORTIER, Appellant, *v.* DELAWARE, LACKAWANNA and WESTERN RAILROAD COMPANY and Others, Respondents.

Adverse possession — piles driven, but not used, do not constitute a substantial inclosure.

Piles driven outside of a dock, and left uncovered and unused, do not constitute a substantial inclosure, within the meaning of section 872 of the Code of Civil Procedure, relating to adverse possession.

APPEAL by the plaintiff, James P. Fortier, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Erie on the 11th day of February, 1901, upon the verdict of a jury, and also from an order entered in said clerk's office on the 24th day of October, 1900, denying the plaintiff's motion for a new trial made upon the minutes.

Lewis & Lewis, for the appellant.

Rogers, Locke & Milburn, for the respondents.

WILLIAMS, J.:

The judgment and order should be affirmed, with costs.

The action was brought to recover real property, with damages for the detention thereof. The Delaware, Lackawanna and Western Railroad Company is the principal defendant, the property in question being a part of its terminal in the city of Buffalo. The other defendants were made parties upon the allegation that they had some interest in the property also. The plaintiff claimed that he was, about November 15, 1880, the owner and in possession of the property, and that the defendant (the Delaware, Lackawanna and Western Railroad Company) wrongfully took possession thereof, and has ever since retained the same. The defendant disputed this and claimed itself to be the owner and entitled to the possession of the property. The plaintiff based his claim of ownership and right to possession upon alleged adverse possession for more than twenty years. He never had any conveyance of the property, and never made any claim of ownership or title under a written instrument or a judgment or decree. The defendant received a conveyance February 24, 1868, which it claimed covered the property in ques-

tion, and its grantor acquired title to the property by conveyances constituting a perfect chain of title from the Holland Land Company, the original landowner in 1827, down to such grantor. The plaintiff denied that defendant's conveyance covered the property in question. On the north bank of Buffalo creek, where it flowed into Lake Erie, was a pier constructed by the government, of stone, known as North pier. The first conveyance in defendant's chain of title in 1827 described two lots, Nos. 150 and 151, upon a map made by Joseph Endicott of the property of the grantors. Lot No. 151 was bounded on the west by Lake Erie and on the south by the North pier. Lot No. 150 was bounded on the west by Lake Erie also, was north of lot No. 151, an avenue only being between them. In 1852, 1853 and 1854 there was an old dock and some buildings thereon extending north from the North pier near its westerly end, and this dock and buildings the plaintiff claimed to have taken possession of in 1853 or 1854, and he claimed this dock was westerly of and entirely outside of lots Nos. 150 and 151. It may not be very material to determine this dispute between the parties as to whether defendant's deed covered the property taken possession of by plaintiff, because if the plaintiff ever acquired title to the property by adverse possession at all he did so before defendant received its conveyance, and plaintiff must succeed here if at all upon the strength of his own title and not the weakness of the defendant's title.

Whether plaintiff's possession was continuous from 1853 or 1854 for more than twenty years, as claimed by him, was a question for the jury, and was submitted to them by the court. The plaintiff claimed the dock, as possessed by him, extended from the North pier to the extension of Jay street, which street was parallel with the pier. In 1857 he drove some piles westerly of the dock out to the end of the pier, and claimed to have possession of that space and to have acquired title thereto by adverse possession also. The court charged the jury that, in order to constitute adverse possession, the occupation must be taken and continued under claim of title, exclusive of any other right, and such is the provision of the Code of Civil Procedure (§ 369 *et seq.*). The evidence was quite meager, if there was any at all, that the plaintiff, when he entered into the occupancy of the property, claimed title thereto and especially that his

claim was exclusive of any other right. The evidence rather tends to show that he claimed his grandfather had some rights there which others besides the plaintiff were interested in. This could hardly be a claim of title exclusive of any other right, but it was a question of fact for the jury at least, and was left to them by the court. The claim here made not being based upon a written instrument or a judgment or decree, only the property actually occupied could be deemed to be held adversely (Code Civ. Proc. § 371), and for this purpose land could be deemed to be occupied or possessed only when it was protected by a substantial inclosure or was usually cultivated or improved. (Code Civ. Proc. § 372.) The court submitted this question to the jury so far as the dock itself was concerned, but refused to submit to the jury the question whether the portion where the piles were driven was thereby protected by a substantial inclosure. Of course it was not usually cultivated or improved. Nothing was done except to drive the piles and leave them, without cover or any use whatever during the twenty years thereafter.

We think the court was not in error in taking this question from the jury. Upon the evidence most favorable to the plaintiff it could not be found that this portion of the property was during all the twenty years protected by a substantial inclosure within the provision of section 372 of the Code referred to.

The verdict of the jury for the defendant may have been based upon the finding that there was no occupancy shown under claim of title, exclusive of any other right, or upon the finding that actual continuous occupancy or possession for twenty years was not shown.

In either case the verdict should not be disturbed by this court.

The judgment and order should, therefore, be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

In the Matter of the Estate of GEORGE N. KENNEDY, Deceased.
NATHAN L. MILLER, as Comptroller of the State of New York,
Appellant, v. WILLIAM G. TRACY and GRANT D. GREEN, as
Executors of and Trustees under the Last Will and Testament of
GEORGE N. KENNEDY, Deceased, and JOHN L. STANDART, Resid-
uary Devisee and Legatee under said Will, Respondents.

Transfer tax — estates in expectancy transferred since 1899 are presently taxable — the amendment of section 230 of the Tax Law made in 1901 applies only to estates in expectancy transferred prior to 1899 — appeal from a surrogate's decree fixing a transfer tax — scope of the review by the Appellate Division.

Section 230 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1897, chap. 284) provided: "Estates in expectancy which are contingent or defeasible shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof."

The section was amended by chapter 76 of the Laws of 1899 by omitting the provision above quoted and inserting in place thereof the following: "Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable.

* * * When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith out of the property transferred."

By chapters 178 and 493 of the Laws of 1901 the section was amended by inserting therein, after the provision last quoted, the following: "Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof."

Held, that, by the amendment of 1901, the Legislature did not intend to change the general policy of making estates in expectancy presently taxable; That the application of the clause inserted in the section by the amendment of 1901 was limited by the words, "and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance," to cases in which transfers of estates in expectancy had occurred prior to 1899 and in which no proceedings had been taken to determine the tax.

Under section 232 of the Tax Law, as amended by chapter 173 of the Laws of 1901, which provides that the notice of appeal to a surrogate from a determination fixing the amount of a transfer tax, shall state the grounds upon which the appeal is taken, the Appellate Division is confined to a consideration of those grounds upon an appeal from the surrogate's decree.

APPEAL by the plaintiff, Nathan L. Miller, as Comptroller of the State of New York, from a decree of the Surrogate's Court of the county of Onondaga, entered in said Surrogate's Court on the 20th day of January, 1903, modifying an order entered in said court on the 5th day of March, 1902, fixing the transfer tax upon the estate of George N. Kennedy, deceased.

John McLennan and Burton B. Parsons, for the appellant.

George D. Chapman and James G. Tracy, for the respondents.

WILLIAMS, J.:

The order or decree of January 20, 1903, should be reversed, and that of March 5, 1902, affirmed, with costs to the appellant.

The principal question raised by this appeal is whether certain future contingent interests in the estate were taxable presently or only when the persons entitled thereto should come into the possession of the same.

The surrogate at first held the interests taxable presently, but on appeal reversed himself and held they were not taxable until possession thereof was secured by the persons interested therein. This latter decision was based upon a construction of the statute, which we regard as erroneous. Prior to 1899, section 230 of the Tax Law (Laws of 1896, chap. 908), as amended by chapter 284 of the Laws of 1897, provided: "Estates in expectancy which are contingent or defeasible shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof." Under this provision of the statute it was repeatedly held, that future contingent estates were not taxable until they vested in possession and the beneficial owner could be ascertained. (*Matter of Vanderbilt*, 172 N. Y. 69.)

This section was amended by chapter 76 of the Laws of 1899, and the provision above quoted was omitted, and in place thereof the following provision was inserted: "Whenever a transfer of

property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. * * * When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, out of the property transferred." It was held that by this amendment a change was intended, making contingent estates taxable forthwith. (*Matter of Vanderbilt, supra.*)

In 1901 this section was again amended (Chaps. 173 and 493 of that year) by inserting therein, after the provision last above quoted, the following: "Estates in expectancy which are contingent or defeasible [and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance], shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof." The controversy is as to the construction of this provision in the amendment of 1901. It will be observed that the language (except that which we have included in brackets) is the same as the clause above quoted from the amendment of 1897, which was omitted entirely in the amendment of 1899. This language in the amendment of 1901 does not apply to all estates of the kind named, but is limited by the language in brackets to those in which proceedings to determine the tax had not been commenced or the taxation had been held in abeyance. The surrogate construed the 1st clause in this limitation as covering all such estates transferred after the amendment of 1901 went into effect and, therefore, as covering the estates herein, the death of the testator having occurred September 7, 1901. If this were the intention of the Legislature, the language inserted by the amendment of 1899 making such estates presently taxable would not have been retained in the amendment of 1901. There would have been no occasion for it. By the amendment of 1897 these estates were not

taxable presently, but the taxation thereof was held in abeyance. By the amendment of 1899 the language of the amendment of 1897 referred to was omitted and the provision expressly made for taxation presently. The intention of the Legislature was thus made clear and certain to change from a future to a present taxation in all cases of such estates. Then by the amendment of 1901 this language of the amendment of 1899 was retained, showing the general legislative intent remained the same and the language here in question was inserted providing that in certain specified cases a future taxation was intended as under the amendment of 1897. It is apparent that the cases so intended to be provided for were limited in number and not *all* the cases thereafter occurring.

We think this provision was intended to apply only to those cases unprovided for by the statute of 1899, and left so until 1901, where the transfers had occurred prior to 1899 and there had under the amendment of 1897 been no proceedings taken to impose the tax; the taxation had been held in abeyance until the future time when the tax should be assessed under the amendment of 1897. In view of the amendment of 1899, omitting the provision as to future assessments contained in the amendment of 1897, these cases were covered by no provision of the statute, and hence this one was inserted in the amendment of 1901 to provide therefor. We do not think the Legislature intended to change the general policy of *present* instead of *future* assessments of estates of this nature which was clearly indicated in the amendment of 1899, which was retained in the amendment of 1901.

This was the sole ground of the decision by the Surrogate's Court, and for his error in this regard the order appealed from should be reversed. Aside from the questions relating to the values of the property fixed by the appraiser, the only question raised by the notice of appeal to the Surrogate's Court was the one we have discussed, and we think, therefore, the other questions suggested in behalf of the appellants, are not properly here for our consideration. Section 232 of the Tax Law, as amended by chapter 173 of the Laws of 1901, provides that the notice of appeal to the surrogate shall state the grounds upon which the appeal is taken and, therefore, none except those specified can be considered. (*Matter of Davis*, 149 N. Y. 539, 548.)

The order and decree appealed from should, therefore, be reversed and the former order and decree affirmed, with costs, as hereinbefore stated.

All concurred.

The order and decree of January 20, 1903, is reversed, and that of March 5, 1902, is affirmed, with costs to the appellant.

PATRICK W. CULLINAN, as State Commissioner of Excise of the State of New York, Appellant, v. JOHN F. BURKARD and TITLE AND GUARANTEE COMPANY OF ROCHESTER, Respondents.

Bond given by a pharmacist to obtain a liquor tax certificate—sale by the pharmacist's clerk of liquor without a physician's prescription in violation of his master's instructions—it will sustain an action on the bond—such an action is one on contract, not one to recover a penalty.

Where a pharmacist obtains a liquor tax certificate upon executing a bond conditioned that he will not "suffer or permit any gambling to be done in the place designated by the liquor tax certificate in which the traffic in liquor is to be carried on, or in any yard, booth, garden or any other place appertaining thereto or connected therewith, or suffer or permit such premises to become disorderly," and will "not violate any of the provisions of the Liquor Tax Law," and while he is necessarily absent from his store, a clerk in his employ, in violation of his instructions and in violation of the Liquor Tax Law, sells liquor without requiring the vendee to produce a physician's prescription, the pharmacist and his surety are liable for the penalty prescribed in the bond.

The language of the condition of the bond will not support the inference that it was intended that the pharmacist be held liable only for those violations of the Liquor Tax Law which he himself has committed.

An action upon a bond given in order to procure a liquor tax certificate is one upon a contract obligation, and not one to recover a penalty or forfeiture imposed by statute.

APPEAL by the plaintiff, Patrick W. Cullinan, as State Commissioner of Excise of the State of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Monroe on the 24th day of September, 1903, upon the dismissal of the complaint by direction of the court after a trial at the Monroe Trial Term, and also from an order

entered in said clerk's office on the 16th day of September, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

William E. Schenck, for the appellant.

Charles J. Bissell, for the respondents.

HISCOCK, J.:

This action was brought by plaintiff to recover the sum of \$500, upon and by virtue of a bond executed by the defendants under the provisions of the Liquor Tax Law (Laws of 1896, chap. 112 as amd. by Laws of 1897, chap. 312), upon the application by the defendant Burkard for the issuance of a liquor tax certificate to him covering the sale of liquor by a pharmacist. Such recovery was sought upon the ground that said individual defendant had violated the provisions of said Liquor Tax Law, and that, therefore, he and the other defendant as surety had become liable upon said bond. The alleged violation consisted of the sale of liquor without production by the vendee of the necessary physician's prescription. The learned trial justice before whom the case was tried dismissed the complaint upon the ground solely that said unlawful sale, which was undisputed, was made by the defendant Burkard's clerk not only without his authority, but against his express commands.

We think that the learned justice erred in the views and principles which he applied to the solution of the questions presented in the case, and that the judgment must be reversed.

The facts presented to us are practically without dispute. If any divergent inferences even were to be drawn from them, it would be our duty to adopt those most favoring the defendants, because at the close of the evidence each side moved for a disposition of the case as upon questions of law only, thereby conferring upon the justice presiding the power and duty to draw any legitimate deductions from the facts which might be necessary to or involved in his decision, and which, as already stated, was in favor of the defendants.

The individual defendant was a pharmacist doing business in the city of Rochester. He made application for a certificate for the business of trafficking in liquor by him as a duly licensed pharmacist, and upon such application he, with the other defendant as surety,

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executed the requisite and usual bond. Said bond was conditioned in the sum of \$500 that, amongst other things, the holder of the certificate would not "suffer or permit any gambling to be done in the place designated by the liquor tax certificate in which the traffic in liquors is (was) to be carried on, or in any yard, booth, garden or any other place appertaining thereto or connected therewith, or suffer or permit such premises to become disorderly," and would "not violate any of the provisions of the Liquor Tax Law."

Burkard was compelled to be absent from his store, and while he was so absent a clerk in his regular employment sold liquor without requesting the physician's prescription. Such sale was in direct violation of the employer's instructions, but there was no evidence that the clerk did it wantonly, willfully or maliciously in pursuit of any object or purpose of his own as distinguished from the business of his employer in which he was engaged.

The simple and narrow question presented to us is, whether the principal and surety are liable upon a bond such as was given in this case, where the violation complained of consists of an unlawful sale of liquor by an employee acting in the regular line of his employment but against the commands of his employer, in respect to that particular detail. We think they are.

It is so well settled by controlling authority that the learned counsel for the respondents concedes, and we without elaboration and discussion may assume the proposition, that this action is upon a contract obligation and not one to recover a penalty or forfeiture imposed by statute; that the bond upon which defendants are sought to be held in effect amounted to a contract or agreement for the observance by the person licensed of the provisions of the Liquor Tax Law, and that the sum named in the bond was fixed as the amount which in certain contingencies should be paid as damages which could not be fixed by any of those methods which commonly are applied to the determination of damages. (*Lyman v. Gramercy Club*, 28 App. Div. 30, 35; *Lyman v. Broadway Garden Hotel Co.*, 33 id. 130; *Lyman v. Shenandoah Social Club*, 39 id. 459; *Lyman v. Perlmutter*, 166 N. Y. 410.)

The Legislature, having control of the traffic in liquor, had the undoubted right by means of the requirements for such a bond, in

addition to other civil and criminal penalties prescribed for violations of laws regulating this subject, to secure observation of such laws and to discourage, repress and punish any abuses, evasions and violations which persons might be tempted to attempt.

It had the undoubted right to prescribe the terms and conditions under which the individual defendant might traffic in liquor as a pharmacist. If, as one of those conditions, he and his surety have executed a bond which upon a fair construction of its terms makes them liable for the unlawful act of an employee even though transgressing specific instructions, there is no reason why they must not submit to such result.

Our attention has been called to no authority which can be regarded as controlling upon us upon this question. The learned counsel for the plaintiff has cited one or two decisions at Trial Terms and various expressions from opinions delivered by the appellate courts which favor his contention. While some authorities have been cited by the learned trial justice in his careful opinion, and also by the counsel for the respondents, upon the general relation of principal and agent which it is urged are opposed to a recovery in this case, we think that upon an examination they may all be so distinguished from the case at bar as not to be decisive thereof. We are, therefore, left to solve the problem at issue by the ordinary and general rules of construction and principles which seem to be applicable.

At the outset defendants' counsel calls our attention to the language used in the bond prohibiting certain things as indicating that the violation here complained of could not be charged to the employer because of the disobedient act of his servant. He calls attention to the fact that whereas the bond provides that the person to whom the certificate is issued will not "suffer or permit" certain things to be done, the provision in this action relied upon is that he "will not violate" certain provisions; that the fair implication from a comparison of these clauses, is that in the first case a proprietor might be held responsible for violations committed by others without his authority or assent, but that in the last case he could not be so held. We think that undue importance in behalf of defendants' argument is attached to the language used. The condition against "suffering or permitting" relates to various illegal

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acts and conditions which could scarcely become offensive without the conduct of others than the person licensed. The bond would not be efficient if it simply prohibited gambling or disorderly conduct alone by the person licensed, and, therefore, he is in effect required not to suffer or permit it to be done by others than himself, and we do not think that any argument flows therefrom that the clause that he will not violate the provisions of the Liquor Tax Law is simply limited to his individual acts as distinguished from those which also might be performed by his employees and servants.

Counsel for respondents also urges that the principles by which proceedings for the revocation and cancellation of liquor tax certificates have been sustained are not applicable, because the statute authorizing such proceedings expressly refers to violations committed not only by the holder of said certificate, but "by his agent, servant, bartender or any person whomsoever in charge of said premises." While it may be that such provision specifically making a holder of a certificate liable for the misconduct of his servants and agents does little more than to expressly embody in words what the general principles of law applicable to principal and agent would necessarily imply, we still have so far acquiesced in his views as not to assume for the purposes of this discussion that the decisions based upon such provisions of the statute are controlling authority for the proposition that the holder of a certificate is responsible for the unauthorized act of his employee under the provision of the statute here up for review.

As we regard it, plaintiff, in seeking a recovery upon the facts appearing in this case, does no more than to invoke the general principles applicable to the relation of employer and servant, so far as third parties are concerned.

It is so well settled as to be elementary that the principal is liable to third persons for the misfeasance, negligence and omissions of his agent in the business of his agency.

A principal is confessedly liable for the acts of his agent within the scope of his general authority. A master is responsible for the fraudulent misrepresentations or deceit, as well as for the negligence or other wrongful act of a servant if committed in the business of his master and within the scope of his employment, although in doing it he departed from or violated the instructions of the master.

A principal cannot exonerate himself from liability for the acts of his agent by showing that they were committed in violation of his instructions. (*Smith v. Reynolds*, 8 Hun, 128, 130; *Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314.)

"The test of a master's responsibility for the act of his servant is whether the act was done in the prosecution of the master's business, not whether it was done in accordance with the instructions of the master to the servant. When, therefore, the servant while engaged in the prosecution of the master's business deviates from his instructions as to the manner of doing it, this does not relieve the master from liability for his acts." (*Cosgrove v. Ogden*, 49 N. Y. 255.)

The liability of the employer for the acts of his servant is not limited to those which have been committed carelessly or negligently, but extends to and covers those which have been committed intentionally and wrongfully. A familiar class of cases illustrating this are those where an employee of a railroad company has designedly and wrongfully thrown or ejected a person from a car. In such cases it has never been held that the employer would be relieved of liability because he had given instructions forbidding such act, provided only the act was performed by the servant within the general line of his duty and having in view the business of his employer.

Reasoning by analogy from such principles and decisions we see no good reason why the holder of a liquor tax certificate should not be held responsible for the act of his clerk in improperly selling liquor while engaged in the performance of his master's business, even though in such act he violated his specific instructions. And if this is so concededly the defendants' liability follows upon the bond in question.

When defendants complied with the provisions of the statute through which alone the issuance of a certificate could be obtained by giving a bond to the effect that the holder would not violate the provisions of such law, they justly may be held to have assumed the burdens and disadvantages which accompanied the privileges thereby secured. It is not violent to assume that at the time said certificate was issued and said bond executed the parties assumed that the holder would not limit himself to such business as he might

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personally do, but that, upon the other hand, he would employ clerks. Nobody would seriously claim that the certificate issued to him covered and protected only those sales of liquor which he might personally make and that any clerk making a sale would be guilty of an illegal act. Likewise, upon the other hand, we think that the State had a right to expect, and that a fair construction of the language used sustains the expectation, that when, as a condition and price of securing the certificate sought, a bond was executed to the effect that the holder would not violate the provisions of law surrounding such certificate, such agreement assured not only against the personal acts of the holder, but also against those to be performed by others whom he employed to stand in his place and stead. Such a bond is an assurance that such authorized business will be conducted in the manner prescribed by the Liquor Tax Law and not otherwise; that the privilege of trafficking in liquor will not be abused and that all of the requirements of the law will be observed in the conduct of the business. It is a contract with the State touching the conduct of the business. (*Lyman v. Schermerhorn*, 53 App. Div. 32, 34.)

The surety upon such an undertaking can, of course, guard against liability by limiting his engagements to the guaranty of a proprietor who will be responsible and careful in the conduct of his business, and the proprietor in turn can protect both himself and his surety from liability under the interpretation which we are giving to the clause before us for review either by personally conducting the business of selling liquor or else by selecting as agents and clerks to stand in his place only those who will be obedient and law abiding. The proprietor has absolute control over these details and the State necessarily has almost none. The law providing for the issuance of certificates, subject to only a few exceptions, gives an absolute right to the applicant to take one out. Dependence is placed upon provisions requiring observance of the law and punishing violations thereof, rather than upon a selection of persons who are to conduct the business. In the administration of this business great reliance and justly, as we believe, has come to be placed upon the execution of bonds like the one now before us as guaranteeing a responsible, careful and law-abiding conduct of the traffic in liquors. The surety becomes interested in and watchful of the character of the

vendor for whose fidelity he has engaged, and by the construction at which we have arrived the vendor, in turn, will become interested in and watchful of the character and conduct of those to whom he delegates the conduct of this business. We think this is as it should be. Upon the other hand, we believe that a very wide and unfortunate breach would be made in the administration of the system now in force for the supervision and regulation of the traffic in liquor if it could be urged as a successful defense to an action brought upon a bond like this, that the proprietor was temporarily absent, and that before going he had instructed the clerk whom he empowered to stand in his place in conducting the business not to violate the law.

Somebody should be made responsible for the lawful management of a business under one of these certificates, and we think that naturally and properly that responsibility should be placed upon the proprietor of the business broadly enough so that he and his surety will be responsible for a violation of the law by a clerk and employee. The People of the State are offended and injured by the failure to observe the laws which they have adopted, and we see no good reason why they should be limited to a lesser degree of recourse against the employer of the clerk who has committed the offense than is ordinarily vouchsafed to third parties in other departments of business and life where an employee intrusted with the management of his employer's business has been guilty of wrongdoing.

It is suggested by the learned trial justice in his opinion that a decision allowing a recovery in such a case as this will work great injustice to the holder of the liquor tax certificate; that he can be subjected to loss of his license and the payment of penalties "simply because his servant for some petty grievance sold liquor contrary to law and for the express purpose of injuring his master." (41 Misc. Rep. 321, 324.) We see no such danger as that. The same law which holds an employer liable for an act committed by his servant within the general line and scope of his authority, even though at variance with special instructions, establishes, upon the other hand, that the same employer will cease to be liable the moment his servant steps outside of his employment and starts in pursuit of some personal end or attempts to gratify some personal motive.

The learned counsel for the respondents, in a vigorous and attrac-

tive manner, urges that confusion and inconsistency will follow from a decision such as we are making. Certain provisions of the Liquor Tax Law provide that the holder of a certificate guilty of violating the law shall be guilty of a misdemeanor and lose his certificate. The counsel points to the fact that concededly the defendant Burkard could not under these provisions, upon the facts of this case, be convicted of a misdemeanor and deprived of his certificate. Therefore, he complains because the facts which would not secure such a conviction and loss under one part of the law are still good enough, as he phrases it, to secure a liability under other provisions of the law relating to the bond in question. We fail to see anything especially new, strange or anomalous in these results. The Legislature had the perfect right to prescribe any number of different remedies and liabilities for violation of the law. The one imposing a responsibility under this bond is in addition to and outside of the other ones referred to by counsel. An employer may very well be liable civilly for the acts of his servant and still not be subject to conviction criminally. Referring again to an illustration in the relation of principal and agent already utilized, a common carrier would be liable civilly for the unauthorized and unlawful act of his employee who, in seeking to promote the business in which he was engaged, unlawfully and improperly ejected a person from a car. Said employer, however, assuming that he was an individual, could not by any means be criminally convicted of assault and battery for such unauthorized and forbidden act.

Entertaining these views, we think the judgment should be reversed and a new trial granted.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event.

FRANK LANE, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Negligence — injury to a servant employed under a locomotive in consequence of the moving of the locomotive — failure to promulgate rules for his protection — where one of two rules would be sufficient, negligence cannot be predicated upon a failure to adopt both of them — expert evidence that certain rules were "necessary" is incompetent — it is a question for the jury.

In an action brought to recover damages for personal injuries, it appeared that the defendant railroad company was accustomed to run locomotives upon a track in the vicinity of a roundhouse for the purpose of having the ashes and cinders removed from their ashpans; that the ordinary process was for a hostler to enter the locomotive and shake down the ashes while another man would crawl under the locomotive and hoe out the contents of the ashpan; that while the plaintiff was under a locomotive performing this work, and after the hostler, who accompanied him, had left the engine, it was set in motion by an engineer and the plaintiff was injured. The negligence alleged on the part of the defendant was its failure to promulgate rules for the plaintiff's protection.

Upon the trial an expert witness was allowed, over the objection and exception of the defendant, to state, in answer to a hypothetical question, that a rule would have been proper to protect the man engaged in hoeing out the ashpan; that such a rule was "necessary;" that there should have been a rule that the hostler should not leave the locomotive until the man engaged in hoeing out the ashes had come from under the locomotive, and also a rule requiring the placing of a red light on each end of the locomotive.

Held, as a matter of law, that the defendant was not required to promulgate and observe both of the rules suggested by the expert witness, as, if the hostler remained upon the locomotive while his fellow-servant was at work hoeing out the pan, it would not be necessary to take the further precaution of placing red lights at each end of the locomotive;

That it was improper to allow the expert witness to testify that the rules suggested by him were "necessary," as it was competent for the jury, when all the facts and circumstances bearing upon the situation had been placed before them, to determine that question for themselves.

MCLENNAN, P. J., dissented.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Jefferson on the 29th day of October, 1902, upon the verdict of a jury for \$5,000, and also from an order entered in said clerk's office on the 28th day of October, 1902, denying the defendant's motion for a new trial made upon the minutes.

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Henry Purcell, for the appellant.

N. F. Breen, for the respondent.

HISCOCK, J. .

This action was brought by plaintiff to recover damages claimed to have been sustained through the negligence of the defendant. He was injured by a locomotive in defendant's yard being put in motion while he was at work thereunder cleaning out the ashpan, and the negligence alleged was that defendant had failed to prescribe proper rules to prevent employees from starting up an engine under such circumstances. We think such errors were committed by the learned trial justice in receiving evidence as to the necessity for such rules, and in permitting the jury to follow such evidence, as requires a reversal of the judgment.

Defendant had a track near the roundhouse in its yard at Watertown, N. Y., upon which it was accustomed to run engines for the purpose of having their ashpans cleaned of the accumulated ashes and cinders. There was accommodation for seven or eight engines at a time. The ordinary process was that an employee, known as a "hostler," and another who hoed out the ashpans, in the first instance, commenced work upon the engine at the same time. The hostler would enter the engine and shake down the ashes; the other man, who upon the occasion in question was the plaintiff, would crawl under the engine for the purpose of hoeing out the pan. Ordinarily a hostler would get through first, and if there were other engines to be cleaned out, would sometimes, at least, leave the first engine while the hoer was still under it and go to a second one. There was evidence tending to show that no rules had been prescribed which we, certainly as matter of law, can say were applicable to the situation for the guarding of an engine while the employee was at work thereunder. Sometimes train crews would come down and take an engine from this yard instead of from the roundhouse or from some other proper place, and sometimes this would be done by strange crews.

While plaintiff was thus at work under an engine during the night of December 13, 1900, and apparently after his companion hostler had left that particular engine to go elsewhere, an engineer

came down and put the locomotive in motion, with the result that plaintiff was seriously injured. There was evidence tending to show that upon four or five other occasions, during the several years preceding this accident, an engine in a similar manner had been improperly put in motion while the hoer was at work thereunder. Plaintiff had been doing the work in question for a period of eight or nine years.

Upon the trial, in answer to a hypothetical question over the objection and exception of the defendant, a witness was allowed to state that a rule would have been proper to protect the man hoeing out the engine; also that such a rule was "necessary." He was then further allowed to state that there should have been a rule "not to allow a hostler to leave an engine alone until the man under there to hoe out was out of there," and also "by placing a red light on each end of the engine." He did not state these rules as being necessary or proper in the alternative, but coupled them together.

In submitting the case to the jury the learned trial justice held that the jury must determine "whether those two specific rules or whether one of them should have been adopted by the defendant for the protection of this plaintiff," and subsequently he refused to charge "that the adoption of both the rules as described or testified to by the witness Cooper would have been an exercise of care greater than the law would warrant under the circumstances of the case, or than the defendant under the circumstances of the case would be required to exercise."

Thus we have it that the witness as an expert was allowed to swear that it was "necessary" that the defendant, in the proper operation of its road, should prescribe these two specific rules, and then that the jury were permitted upon and following such evidence to charge the defendant with such obligation.

In the first place we think it was error for the trial court to refuse to charge the request of the defendant above quoted. We think it may properly be held as a matter of law that the defendant should not be required to prescribe and observe both of the rules suggested. If the hostler remained on the engine while his fellow-servant was at work thereunder hoeing out the pan, we cannot conceive how it could be necessary to have any further precautions in the way of red lights placed at each end of the locomotive. The

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place for the hostler while he was at work upon the engine was in the cab, and if he stayed there nobody could possibly get upon the engine and put it in motion without his objection and warning. This ought to be sufficient protection for any contingency which could possibly arise outside of an attempt by some one willfully to take possession of and move off with the locomotive.

In the second place we think it was incompetent and improper to allow the witness to testify in effect that these rules were "necessary," thereby meaning that they were necessary and indispensable to a proper and safe operation by defendant of its road.

No harm at least could have come from allowing the witness to state that either of the rules indicated would have been practical and effective to prevent an accident such as occurred. This, however, was so self-evident that the jury could have comprehended it without a sworn statement to that effect. When, however, the witness was allowed to go further and testify that such a rule was necessary ; that is, that the road could not be safely operated without it, we think his testimony went to undue lengths, and may have had an improper and injurious influence with the jury.

It is difficult to draw always the line beyond which expert testimony may not go, but in this case it seems clear that it has gone beyond what should be the location of that line into a field which was pre-empted by the jury.

The situation to be dealt with in this case was a comparatively easy one. There was not involved, as in some cases, any complex machinery, extensive and dangerous structures, subtle and not easily understood chemical or mechanical elements and attributes or questions of the resistance by various materials to strains or pressure, and the proper methods of putting such materials together to resist the same. The locomotive as it stood over plaintiff was of itself perfectly harmless. It is not suggested that it got in motion through any of its inherent qualities or conditions. It only became harmful to plaintiff when put in motion by a careless coemployee. The main element at least to be considered by the jury was the liability of a negligent servant stepping upon and putting in motion the locomotive without knowing whether a man was at work thereunder. We assume that everybody understood that engines were put upon the track in question for the purpose of being cleaned out and that

the only way they could be cleaned out was by plaintiff or somebody else going under them. Simple human carelessness was, therefore, the main thing to be guarded against. The evidence very completely and simply put before the jury this situation and also by reference to the history of eight or nine years the liability to occurrence of such a thing as did happen when plaintiff was injured. Under these circumstances, the jury had before them the entire situation and were perfectly competent to decide whether it was necessary that defendant in the operation of its road should prescribe some rule.

In opposition to this view plaintiff has called to our attention various cases in which the court has in substance said that plaintiff could not recover because there was no evidence by experts or other witnesses to show that any rule was necessary or practicable in the case under review. Each case upon the question under review must be largely decided by its own peculiar circumstances. Furthermore, we do not regard a suggestion like the above as sufficient to lay down the rule that a witness may go upon the stand and in terms swear that a certain rule is necessary. He very likely might give evidence from which a jury could say this.

In the next place our attention is called to the recent case of *Finn v. Cassidy* (165 N. Y. 584) as a substantially controlling authority upon the admissibility of the expert testimony in this case. We do not, however, regard it as such.

Whatever was said in that case must be read and interpreted in the light of the facts and issues which were actually before the court for decision. In that case the plaintiff was injured by the caving in of the bank of a trench which was in process of construction. This trench was thirty-one feet deep and one side of it for a distance of twenty feet ran along a chimney stack foundation which was twenty feet deep, the stack itself being over one hundred feet high. The trench had been carried down at an angle with a "batter wall" and narrow cuts three or four feet deep had been made starting from the bottom of the trench and running at right angles through the wall and extending upwards to within about a foot of the foundation and which cuts were filled with piers of masonry as soon as made. The earth between the tops of the cuts and the bottom of the foundation was hardpan and had become

insecure through the action of water. Under these circumstances an expert was allowed to state that the method of constructing the cut for the purpose of underpinning or supporting the foundation of the stack was improper and to state what in his opinion would have been a proper method to render it safe for persons working therein. The Court of Appeals, in sustaining the admission of this evidence, amongst other things, said : "It is quite probable that there was not a man upon the jury, unless he happened to be an expert, who would have attempted to solve the problem of properly supporting and sustaining the chimney in question without calling to his aid some expert advice from an engineer or some person of experience on such a subject. The common mind, as we know, is not always equal to the proper solution of such a problem in such an emergency, and the counsel and advice of engineers or persons of experience in such matters is always valuable and desirable." And again : "The contention that the jury could have drawn the conclusion as well as the engineer is not, I think, correct. It is very difficult for a witness to picture to a jury in words the real situation that confronted the plaintiff at the moment that he stepped into the trench by the direction of the master. It would be still more difficult for them to determine what should have been done in order to make the place where the plaintiff was injured reasonably safe and suitable for the workmen. To say that an engineer of experience in such matters could not assist the jury by an expression of opinion would be to ignore well-known facts and to disregard the principle upon which the opinions of experts are received in evidence." And the learned court in fortification of its opinion that the evidence in that particular case was admissible cited a line of authorities in which similar expert testimony had been held competent. In accordance with the principles already adverted to by us the cases so cited almost uniformly involved questions of construction or of the strength of materials and the proper method of arranging the same to sustain weight ; of the strain which would be put upon structures by various uses ; of the proper construction and use of various machines. The cases so cited in approval of the doctrine laid down in the case under review plainly disclosed situations and issues which could not be so put before a jury as to secure an

intelligent judgment, but which clearly could be explained and elucidated by the opinions of people especially expert therein.

It will be seen that the issue presented in the case at bar was very different from and very much simpler than the ones involved in the *Finn* case and those other cases cited therein.

It seems to us that this case comes more within the principles of *Ferguson v. Hubbell* (97 N. Y. 507), where the issue involved was whether it was negligent to set fire to fallow land at a dry season of the year when the wind was blowing a strong gale. All of the conditions which surrounded the act complained of were simple and easily understood. They were all spread out before the jury by the evidence and it was held that the jury were perfectly competent to form a judgment upon the matters involved and that it was error to allow the evidence of experts that such act was or was not negligent.

This case seems much less to call for the opinion given by the expert than did the case of *Van Wycklen v. City of Brooklyn* (118 N. Y. 424) for the evidence there offered. In that case the trial court refused to allow an expert to give as his opinion that certain sunken wells would not draw water from a specified source. The Court of Appeals sustained this ruling, saying: "While it is no longer a valid objection to the expression of an opinion by a witness, that it is upon the precise question which the jury are to determine, * * * evidence of that character is only allowed when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable."

The principles laid down in the very careful opinion in the case of *Schwander v. Birge* (46 Hun, 66) seem to us very applicable to the disposition of the present appeal. In that case the intestate was killed while attempting to escape from an upper floor of a building used by defendant for manufacturing purposes. The alleged negligence consisted in not providing sufficient means of egress from the building. Upon the trial the defendant's superintendent was allowed to state in substance that the facilities supplied did constitute "a proper and sufficient mode of access and egress from the building under any circumstances," and that from the experience which he had had and in the exercise of his judgment he did

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regard the stairs and the door furnished "as a sufficient and proper mode of egress if any accident occurred." The appellate court held that it was improper to allow this evidence, stating, in substance, that the question whether the means of egress were reasonably safe and all that due care required of the defendant to provide for his employees was for the jury; that that was one of the vital questions to be determined by them, and that the entire location and situation could be stated and a complete description of the room involved given so as to convey to the jury an intelligent understanding of the situation, and that under such circumstances the rules of evidence required that the testimony of a witness should be confined to a statement of the facts, and that the conclusions or opinions of witnesses should not be permitted in evidence. The court in its excellent opinion, after a careful review of many authorities bearing on this question, says: "The governing rule deduced from the cases permitting the opinions of witnesses is that the subject must be one of science or skill or one of which observation and experience have given the opportunity and means of knowledge, which exists in reasons rather than descriptive facts, and, therefore, cannot be intelligently communicated to others not familiar with the subject so as to possess them with a full understanding of it. In the case at bar none of the elements requisite to the opinion of an expert seem to exist in reference to the subject of inquiry referred to. It involved no question of architecture as such, no combination of forces or strength of structural support requiring scientific or mechanical deduction."

We, therefore, reach the conclusion in this case that it was improper to allow the witness to invade the jurisdiction of the jury and to express his opinion as to the necessity of certain specified rules, thus supplanting and forestalling the action of the jury upon the vital question in the case without any of those adequate reasons therefor which at times may concededly exist.

We think the judgment should be reversed and a new trial granted.

SPRING and STOVER, JJ., concurred; WILLIAMS, J., concurred in result upon the ground of assumed risk; McLENNAN, P. J., dissented.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

BERNARD MURPHY, Respondent, *v.* PATRICK HALLINAN and JAMES HALLINAN, Appellants.

Blasting — explosion of one of two dynamite charges creating a fissure communicating with the unexploded charge — injury to a servant by the premature explosion of the latter charge in consequence of the existence of such fissure — when the master is not liable unless he knew of the fissure.

In an action brought to recover damages for personal injuries, it appeared that the defendants, who were copartners, were engaged in excavating rock by means of dynamite and that the plaintiff was in their employ; that two holes were drilled in the rock six feet apart, one of the holes being drilled in a ledge which was about a foot higher than the ledge in which the other hole was drilled; that the upper hole was four and a half feet long and the lower hole three and a half feet long; that both holes were charged with dynamite and that an attempt was made to explode such dynamite, but that the dynamite in the lower hole did not explode; that by the explosion of the charge in the upper hole a loose rock was thrown on top of the lower ledge of rock near the hole which contained the unexploded charge; that while the plaintiff was attempting to remove the unexploded charge with a metal spoon and while one of the defendants and an assistant were hammering upon the detached piece of rock, the dynamite in the lower hole exploded injuring the plaintiff.

The plaintiff gave evidence tending to show that as a result of the explosion of the charge in the upper hole a seam about a quarter of an inch wide was created which ran through the lower hole, and that the ledge upon which the detached piece of rock lay had itself become somewhat loosened. The plaintiff claimed that the hammering upon the detached piece of rock resting upon the loose rock next to the lower hole communicated a jar to the dynamite in that hole and exploded it.

The evidence established that the explosion could not have been occasioned by the hammering had the seam and the loosening of the adjacent rock not existed. There was no direct evidence that the defendant, James Hallinan, who was present at the time of the accident, knew of the existence of the seam, and the jury might properly have found that he did not have such knowledge.

Held, that it was improper for the court to refuse to charge, "that unless the defendants knew, or the defendant James Hallinan knew, that the rock on the south side of the hole; on the south side of the crack running through the lower hole, was loose at the time of an attempt to split the rock with the wedge that then there can be no recovery;" and, "that the defendant James Hallinan, and consequently the defendants in this case, cannot be guilty of negligence if James Hallinan did not know of the existence of the crack running through the lower hole;"

That, in the absence of evidence that the explosion of the charge in the upper hole was liable to create a fissure running through the lower hole, it was not

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incumbent upon the defendant James Hallinan, who was present at the time of the accident, to make an examination for the purpose of seeing whether that condition existed.

APPEAL by the defendants, Patrick Hallinan and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Herkimer on the 13th day of April, 1903, upon the verdict of a jury for \$1,500, and also from an order entered in said clerk's office on the 10th day of April, 1903, denying the defendants' motion for a new trial made upon the minutes.

The judgment appealed from dismissed the complaint as to Peter Hallinan, one of the original defendants, and from that part thereof no appeal is taken.

Charles J. Palmer, for the appellants.

Robert F. Livingston, for the respondent.

HISCOCK, J.:

This action was brought to recover damages resulting from the unexpected explosion of a charge of dynamite employed for blasting purposes, and which it is claimed was caused by the negligent act of one of the defendants, who were copartners, in hammering a rock near the hole where the dynamite was.

We think the learned trial justice committed error in refusing to charge, as requested by defendants, upon certain propositions assuming want of knowledge of the condition of the hole containing the dynamite.

The defendants were engaged in cleaning out some rock in the city of Little Falls for the purpose of erecting a building. Plaintiff was in their employ. It was necessary to blast the rock and for this purpose upon the occasion in question two holes had been drilled therein. These were about six feet apart. One was drilled in a bed of rock about a foot higher than the other. The upper hole was about four feet and a half long, and the other one a foot shallower. A charge of dynamite was put in each and an attempt made to explode the same. The charge in the lower hole, however, did not explode and subsequently the plaintiff with a metal spoon

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was engaged in trying to remove it. A loose rock, thrown out by the blast which did explode, lay on top of the table of rock near the hole which held the unexploded charge. Evidence was given in behalf of plaintiff tending to show that as a result of the explosion in the upper hole a seam was created about a quarter of an inch wide running through the lower hole and that the bed rock next the hole and upon which lay the detached piece of rock already referred to, had itself become somewhat loosened; that while plaintiff had his spoon out of the hole and concurrently with the hammering by the defendant James Hallinan and his assistant upon the detached piece of rock the charge of dynamite in the hole exploded. The claim of plaintiff is that the hammering upon the detached piece resting upon the loose rock next to the hole communicated such a jar to the dynamite as to explode it.

While, as stated, there was evidence tending to show the existence of these conditions, it was very emphatically disputed by opposing testimony given in behalf of the defendants, and they urge, not only that they did not set off the dynamite by any hammering which was done, but that, upon the other hand, the plaintiff undoubtedly set it off by striking the charge or the cap therein with his metal spoon. Whatever may be the truth in respect to this, there does not seem to be any opportunity for plaintiff to successfully claim that the striking done by the defendant James Hallinan and his assistant could possibly have set off the charge of dynamite unless there was a seam through the hole where it rested and the rock adjoining the hole had become more or less loosened. The evidence given at least by one or more of the witnesses called by plaintiff leaves in the mind considerable uncertainty whether under all of the circumstances the dynamite could have been exploded by the hammering, even assuming that there was a seam through the hole. Certainly all of the evidence leaves no doubt that the explosion could not have been occasioned by the hammering if the seam and the loosening of the adjacent rock were not present.

While defendants' evidence disputed the existence of this seam and the loosening of the adjacent rock, it still perhaps might have been permissible for a jury to find that the defendant present knew of it, if, as claimed by plaintiff, it did actually exist. Such finding, however, would have been somewhat by way of inference. There

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was no direct evidence which conclusively established that the defendant James Hallinan did know of the seam if it was there. After the discharge of the blast in the other hole there was more or less debris around the lower one and the said defendant was at work upon and around the detached piece of rock before mentioned. A finding by the jury that he did not know of the seam through the hole and the dislodgement of the rock around it would have been sustained by the evidence.

Under such circumstances the learned court was requested and refused to charge "that unless the defendants knew, or the defendant James Hallinan knew, that the rock on the south side of the hole; on the south side of the crack running through the lower hole, was loose at the time of an attempt to split the rock with the wedge that then there can be no recovery;" also, "that the defendant James Hallinan, and consequently the defendants in this case cannot (could not) be guilty of negligence if James Hallinan did not know of the existence of the crack running through the lower hole." By such refusal to charge upon an assumption of facts which might have been found by the jury, the trial justice necessarily permitted the jury to find that the defendants, through the one there engaged, ought to have known of the alleged condition even if they did not; that in the exercise of the necessary care and diligence the latter should have examined and detected the presence of the conditions which are said to have led up to the accident. We think that, under all of the circumstances surrounding the accident, this imposed upon the defendants a higher degree of responsibility than was proper.

The case was submitted upon the theory, as we understand it, that the jury might find the defendants liable because of the personal negligence of the defendant James Hallinan in striking the rock. We think that practically and in effect that was the charge made. An attempt to apply to the solution of the case those principles which relate to the furnishing to the employee of a suitable place in which to work seems somewhat remote. Upon the theory of the plaintiff the place at which he was put to work was safe enough in the absence of the personal acts of one of the defendants. In the absence of those acts it is insisted that the accident would not have happened, and, therefore, the narrow, specific, practical question is whether

the defendants were guilty of negligence upon such an assumption of facts as was made in the requests to charge already referred to.

As already suggested, these requests leave to be determined by us the question whether, before defendant did or permitted the hammering, he ought to have assumed that the lower hole might have been broken into, and should have examined for such conditions. The two holes were six feet apart, and the bed rock in that locality in which the holes were located was solid gneiss rock. There is no evidence to indicate that the explosion of such a blasting charge as was used was liable to create a fissure running through the hole containing the charge which did not explode. So far as we are able to discover, there is no evidence to indicate that a man exercising ordinary care and caution and prudence and foresight, even in the use of such explosives as dynamite, ought to have foreseen the conditions which by plaintiff are said to have arisen. Apparently the result of the refusals to charge and of the findings by the jury was to hold that simply because a blast had exploded in one place the defendants ought to have known that there would be a crack in a solid rock six feet away. We think that the enforcement of such a rule of liability upon the evidence in this case would practically amount to making the defendants insurers against all possible contingencies, and of requiring them to anticipate and foresee and look out for conditions which no man in the exercise of ordinary care would be required to anticipate.

Various other questions are suggested in the case which we do not regard as essential to decide in view of the conclusions reached upon the branch discussed.

The judgment and order should be reversed.

All concurred; McLENNAN, P. J., SPRING and STOVER, JJ., upon the additional ground that the verdict was against the weight of the evidence.

Judgment and order reversed and new trial ordered, with costs to the appellants to abide event, upon questions of law and of fact.

CHARLES B. WOOD, Appellant, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Negligence—excavation by a railroad company of a trench encroaching upon the premises of a station agent—injury to the station agent by falling into the trench—when he cannot be charged, as matter of law, with knowledge of its existence—defense that he would probably have run into a switch even if the trench had not encroached on his premises.

In an action brought to recover damages for personal injuries, it appeared that the plaintiff was employed as a station agent by the defendant railroad company and that he occupied a house and lot adjoining the railroad lands; that in constructing a derailing switch at the station the railroad company excavated a trench twenty-three inches deep and about three feet wide; that the trench encroached upon the plaintiff's premises for a distance of four feet and was located in the line of a passageway which the plaintiff was accustomed to use extending from the plaintiff's front door to the station; that while the plaintiff was proceeding from his home to the station along this passageway after dark he fell into the trench and was injured.

The plaintiff gave evidence tending to show the existence of certain obstructions which prevented him from seeing or knowing of the trench. It appeared that the derailing switch was located about 125 feet from the station and about 20 feet from the plaintiff's house; that the plaintiff had been advised by the railroad company of the installation of the derailing switch and that under the rules of the railroad company he was charged with the general supervision of the property at and around the station.

Held, that it was error for the court to dismiss the plaintiff's complaint; That it could not be said, as a matter of law, that the plaintiff knew or should have known of the existence of the trench and was, therefore, guilty of contributory negligence in falling into it;

That the defendant could not be relieved from liability upon the theory that the plaintiff would probably have run into the switch even if it had not encroached upon his premises.

MCLENNAN, P. J., and WILLIAMS, J., dissented.

APPEAL by the plaintiff, Charles B. Wood, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Jefferson on the 27th day of May, 1903, upon the dismissal of the complaint by direction of the court after a trial at the Jefferson Trial Term, and also from an order entered in said clerk's office on the 2d day of June, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

Fred B. Pitcher, for the appellant.

Henry Purcell, for the respondent.

HISCOCK, J.:

This action was brought by plaintiff to recover damages claimed to have been sustained through falling into a trench constructed in part upon his premises by defendant while building a switch upon its road.

The plaintiff was nonsuited, and such disposition appears to have been made, and its correctness is now sought to be upheld, principally upon the grounds that plaintiff knew, or ought to have known, of the existence of the trench into which he fell; and, *secondly*, that if such trench had not been upon his premises, but had been entirely upon the premises of the defendant, he probably would have met this accident just the same, and, therefore, ought not to be allowed to recover. We think that the disposition of the case made by the learned trial justice was incorrect and should be reversed.

Defendant had a station at what is known as Evans Mills or Evans. Its tracks there run substantially east and west. Easterly of the station house a highway runs north and south. Adjoining the railroad lands upon the south was a house and lot occupied at the time of the accident by the plaintiff. Plaintiff was defendant's station agent at the place in question. Upon October 15, 1901, defendant through its employees had been engaged in putting a derailing switch at what was known as the Lawton siding at Evans. In so doing it had constructed a trench twenty-three inches deep, about three feet wide and extending upon plaintiff's premises about four feet. This excavation was located in the line of a passageway extending from plaintiff's front door to the station house, which he was accustomed to use in going back and forth between these points. There was also another pathway extending from the rear of his house to the station house, which he used part of the time. Upon the evening of October sixteenth, and after it had become dark, plaintiff had occasion in the course of his business to go from his house to the station house, and while proceeding along the first mentioned pathway or course of travel used by him, ran into the trench as it extended upon his premises, and sustained injuries which occasioned the commencement of this suit.

It seems to be conceded upon the argument of this appeal that the jury had the right to find upon the evidence that defendant had without authority extended an open trench upon plaintiff's premises and into which he fell. This being so, it follows that the jury would have had the further right to find that this conduct upon the part of defendant was wrongful and improper, and might be the basis for a recovery by plaintiff.

It is urged that plaintiff did not upon the occasion of his accident use that degree of care and caution in approaching the railroad tracks which generally and under ordinary circumstances should be used. We think that this, however, independent of any special considerations applicable to this case, was a question of fact for the jury.

But, as stated above, it is especially contended that plaintiff knew or ought to have known of the existence of this trench, and that for this reason he was guilty of contributory negligence. This contention is especially based upon two groups of facts appearing in the case. Upon October fifteenth defendant's supervisor of bridges telegraphed from De Kalb to defendant's trainmaster at Watertown that the derailing switch had been placed in the Lawton siding at Evans, and this telegram was sent to plaintiff at Evans, having indorsed upon it "Note and return. F. E. M." and the plaintiff, upon receipt of it, indorsed thereon "O. K. C. B. W." for his initials, and "10-16" for the month and day. Plaintiff admitted upon the stand that the last indorsement was his, and that he knew what switch was referred to at the time. We do not think, however, that this telegram and this indorsement of plaintiff's thereon charged him as matter of law with knowledge that defendant had dug a trench upon his premises or created the conditions which it is claimed resulted in his accident. In a general way his indorsement of the telegram implied a knowledge that a switch had been put in upon this siding, but we do not think that either his indorsement upon the telegram or his duty as station agent, to which we shall hereafter refer, called upon him to personally inspect the location of the switch and have knowledge of all of the details which had attended its location, and that it would be error as matter of law to charge him with such knowledge.

The second group of facts relied upon to charge plaintiff with

knowledge of the conditions which brought about his accident are as follows: The switch in question was put in about 125 feet from the station and about 20 feet from the plaintiff's house. The book of rules furnished by defendant to plaintiff and with which he must be assumed to have been familiar contained, among other things, the following:

"They (station agents) will have charge of the business of the Company at the station, all property connected therewith and all persons employed thereat.

"Keep the station and grounds in proper condition for the comfort and convenience of patrons. * * *.

"See that the station is supplied with the necessary lanterns, flags and torpedoes, and that they are ready for immediate use. * * *.

"They must know all switches and frogs at their stations are in safe condition for use and that all signals are in proper working order. * * *.

"Be responsible for the care and display of switch lamps * * * and see that they are lighted from sundown to sunrise."

Plaintiff gave evidence with reference to certain obstructions which prevented his seeing or knowing of this trench, and by his evidence made his knowledge thereof a question of fact for the jury, unless he is, by virtue of the rules above quoted, to be charged as matter of law with such knowledge. We think again that the defendant's contention in this respect is erroneous. Concededly such work as the construction of switches and the supervision of tracks was not in defendant's line of duty, but was under the care and custody and control of another department of defendant's road. In a general way the station agent was undoubtedly charged with general supervision of the property at and around the station. Under ordinary circumstances, as between him and the defendant, he was undoubtedly charged with the duty of knowing that the switches and signals were in working order around the station. But manifestly the rules upon this subject applied to switches and signals which were in use and operation. Concededly the switch in question was not in safe condition for use while it was being constructed, and we do not think that it can be said, at least as a matter of law, that plaintiff was so charged with the duty of keeping

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watch of it while it was being put in and before it was completed, that it can be held that he knew all about its condition and the means and details which were being employed to get it into a condition where it could be operated.

Lastly, we do not regard the suggestion made by the learned trial justice in disposing of this case; that if this trench had not been upon plaintiff's premises he undoubtedly would have run into defendant's switch after he had proceeded further along, is a tenable ground for dismissing the complaint. We are not aware of any authority which has gone so far as to hold under the circumstances of this case that a defendant may be relieved of liability for a wrongful act upon the theory that even if it had not acted improperly, still the plaintiff probably would have got injured in some other way.

The judgment and order should be reversed.

All concurred, except McLENNAN, P. J., and WILLIAMS, J., dissenting.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event.

AUGUST UIHLEIN and MICHAEL J. McMANUS, Appellants, v. MARGARET MATTHEWS, Respondent.

Reformation of a quitclaim deed so as to exempt from its operation a covenant restraining the use of the land for saloon purposes — when such relief will be granted.

An agreement was made between Michael J. McManus and Margaret Matthews, who were the owners of adjoining lots, by which McManus granted to Mrs. Matthews a strip of land three and one-half inches wide upon his easterly line and the right to use the easterly wall of the building upon his lot as her westerly wall. Mrs. Matthews granted to McManus for a limited period a right of way over her premises, and also covenanted and agreed that she would "not use or allow her said building (then to be erected) to be used or occupied for a period of five years from the date of this (said) instrument, as a place for the sale of ales, beers, wines or liquors."

Subsequently, when Mrs. Matthews attempted to obtain a loan upon her premises, it appeared that there was some question as to her title to a strip of land adjacent to the lot owned by McManus, and that McManus might possibly make a claim thereto.

Thereafter McManus, upon the application of Mrs. Matthews, executed a quitclaim deed of the premises adjoining his lot. The deed excepted from its operation the right of way heretofore mentioned, but did not except from its operation the covenant restraining Mrs. Matthews from using her land for saloon purposes. The Court of Appeals having decided that the legal effect of the quitclaim deed was to cancel this restrictive covenant, McManus brought an action to have the quitclaim deed reformed so as to except the restrictive covenant from its operation.

The quitclaim deed was executed for the sole purpose of curing the defect of title above mentioned, and the restrictive covenant was not considered by the parties. At the time of the execution of the quitclaim deed a saloon business was being conducted on the lot owned by McManus.

Held, that McManus was entitled to have the deed reformed, under the rule that where parties through ignorance, inadvertence or lack of appreciation of their acts have made a contract different from what was intended, equity will give relief by so changing the instrument that as written it will conform to the agreement as made.

APPEAL by the plaintiffs, August Uihlein and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Monroe on the 10th day of July, 1903, upon the decision of the court, rendered after a trial at the Monroe Special Term, dismissing the complaint upon the merits.

Henry M. Hill, for the appellants.

George E. Milliman, for the respondent.

HISCOCK, J.:

This action was brought to secure the reformation of a quitclaim deed executed by the plaintiff McManus to the defendant Matthews, so that it would exempt from its operation and not affect the provisions of a certain contract theretofore made between the parties thereto, whereby the defendant was restrained from using her premises for saloon purposes for a certain period. The learned trial justice before whom the case was tried found and decided upon the merits that the plaintiffs did not establish a case for such relief and, therefore, dismissed their complaint as above stated. In this determination we think he committed such error as to call for a reversal of the judgment appealed from.

The plaintiff McManus and the defendant Matthews were owners of adjoining lots in the city of Rochester, the lands of the latter lying east of those of the former. The plaintiff Uihlein is a subee-

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quent grantee of, and present lessor to, McManus. In 1898 an agreement was made whereby, amongst other things, McManus granted to Mrs. Matthews a strip of land three and one-half inches wide upon his easterly line and the right to use the easterly wall of the building upon his lot as her westerly wall, and Mrs. Matthews granted upon her part to McManus for a limited period a right of way over her premises, and also covenanted and agreed that she would "not use or allow her said building (then to be erected) to be used or occupied for a period of five years from the date of this (said) instrument, as a place for the sale of ales, beers, wines or liquors." Defendant, having erected her building and made use of McManus' wall, in September of said year applied for a loan upon her property, and it then developed that there was some question about her title to a strip of land two and one-half feet in width east of the McManus property, just where being uncertain. In other words, there seems to have been a surplus of two and one-half feet in this portion of the block to which McManus might make a claim. For the purpose of clearing title, application was made by and in behalf of defendant to him for a quitclaim deed of the premises east of his land. This was subsequently executed and is the source of the present controversy. Its terms of conveyance were broad enough to cover any right which McManus had or might claim to have in and to defendant's premises upon which she desired to secure her loan. It duly excepted from its operation plaintiff's right of way hereinbefore mentioned, but did not except from its operation the clause hereinbefore mentioned restraining defendant from using her land for saloon purposes, and the plaintiffs now desire to have it reformed so as to accomplish this purpose.

The trial court upon a former trial and this court upon appeal from that trial, held in effect that no clause of exception was necessary in said deed in order to prevent it from cutting off and canceling said restrictive covenant (57 App. Div. 476), but the Court of Appeals by a divided vote reversed such decision, holding, in substance, that the entire nature and character of the transaction resulting in the execution of said deed was not sufficient to prevent it from affecting said clause, and that a reformation thereof would be necessary in order to prevent it from accomplishing such result. (172 N. Y. 154.)

It seems to us very plain that the reformation should be had, and that the determination reached by the trial court was not at all warranted by the evidence.

The testimony of the plaintiff McManus is very clear and positive to the effect that the agreement between him and the defendant was for the execution of a deed which should perfect the latter's title to the two and one-half feet about which question had been raised; that this was the sole purpose of the deed, and that he had no intention whatever of releasing defendant from the prohibition against using her premises for saloon purposes; that he was assured by defendant's son, who represented her, in substance, that the deed could not possibly harm him or take away from him any material rights. The son upon the trial of the action quibbled in his evidence and attempted to escape the admission that the sole and only purpose of the deed was as stated by McManus. If the issue of the action rested simply upon the testimony of these two men, it might very well be held that there was such a question of fact as fairly warranted the trial justice in finding that there was no such mistake or fraud as to the deed as would call for or even permit a reformation thereof. But the evidence of other witnesses, either indifferent to the parties or called in behalf of the defendant, and especially that of the person from whom defendant was seeking to make her loan and of the attorney who represented her in her negotiations with plaintiff for the deed, and the allegations of the complaint in the action which was finally started to compel McManus to give a deed, all make it clear and certain beyond any reasonable doubt whatever that defendant had encountered trouble in procuring a loan on account of the uncertainty as to her title to the two and one-half feet of land, and that the only object of a deed from McManus was to cure this trouble. Such evidence does not disclose that there was any objection to or trouble over the clause limiting defendant's use of the premises or any reason for ridding the latter from the effect thereof. The evidence of defendant's attorney in those proceedings shows that his efforts were directed entirely and exclusively to perfecting her title in the strip above mentioned. To our minds the fact especially impressed upon our attention by respondent's counsel that no reference was made in the negotiations between defendant's and plaintiff's attorneys to the restrictive condition is very

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potent evidence on behalf of plaintiff that there was no intention to cut it off by the deed in question.

All of the probabilities surrounding the case are opposed to the idea of a deed intended to cut off this clause. Defendant had no need for it and McManus had no object in giving it. Independent of any other consideration there was then being maintained upon his premises a traffic in liquors which presumably would be injured by the establishment of a similar business upon the adjoining premises which did in fact take place immediately after this deed was executed.

Upon all of the evidence we have no difficulty in reaching the determination that the minds of the parties came together simply and solely in an agreement for a deed to cure the apparent defect in defendant's title to the strip of land referred to, and that there never was any contract for anything else. It is equally clear that McManus executed the deed which did in fact effect more than this through a mistake which was the result of ignorance or inadvertence. If we give to defendant's son, who represented her, credit for sincerity in the assurances which McManus says he gave, he too misapprehended the effect of the conveyance which was being executed. In view of the difficulty which the courts themselves have had in deciding whether the deed did affect the clause in question, it is very easy to believe that the parties and their attorneys entirely failed to think of and guard against this result.

It is not necessary for us to go farther in our conclusions than to hold that the parties through ignorance, inadvertence or lack of appreciation of their acts, have made a contract different than was intended. It is well settled that under such circumstances a court of equity will give relief by so changing the instrument that as written it will conform to the agreement as made. (*Curtis v. Albee*, 167 N. Y. 364; *Avery v. Equitable Life Assurance Society*, 117 id. 451.)

The judgment should be reversed and a new trial granted upon upon the merits.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event upon questions of law and of fact.

HARVEY J. HURD and JAMES T. HURD, Appellants, v. GEORGE WING, Respondent.

Agreement by a grantee of premises to pay for lumber used upon the premises — consideration — when the person supplying the lumber may enforce such agreement — money paid on account will be applied on the oldest items.

January 18, 1896, Edson B. Sawdy conveyed to his wife, Emma A. Sawdy, premises which had been conveyed to him in November, 1895. Upon the original instance and request of the said Edson B. Sawdy a firm of lumber dealers sold and delivered upon the premises between December 9, 1895, and March 26, 1896, a quantity of lumber. Of the total amount, lumber of the value of \$705.87 was used in the construction of buildings upon the premises after they had been conveyed to Mrs. Sawdy, and the evidence was sufficient to sustain a finding that the lumber was so used with the consent of Mrs. Sawdy.

May 6, 1896, when the balance due to the lumber dealers amounted to \$320.91, Mrs. Sawdy and her husband executed a warranty deed of the property to George Wing, and in purported consideration thereof and as part of said transaction the latter executed an agreement whereby he agreed to "assume and pay all valid claims for labor and for all material used by first parties (the Sawdys) for the construction of houses and buildings thereon and to save and protect first parties harmless from each and all said claims or demands thereon." Annexed was "an approximate statement of the claims for labor and materials furnished * * * and * * * intended to be assumed by second party," included in which was the sum due to the lumber dealers.

In an action brought by the lumber dealers against Wing to recover the balance of their claim, the evidence tended to establish that at the time the premises were conveyed to him the lumber dealers could have filed a mechanic's lien against the premises.

Held, that the plaintiffs, so far as they claimed under Edson B. Sawdy, were not entitled to recover, as at the time the premises were conveyed to the defendant, the said Edson B. Sawdy did not have any interest in the premises which would serve as a consideration for the defendant's agreement to pay the plaintiffs' claim;

That the plaintiffs, so far as they claimed under Mrs. Sawdy, were entitled to recover; that the fact that at the time the defendant made the agreement to pay the plaintiffs' claim, the plaintiffs might have filed a mechanic's lien against the premises, considered in connection with the fact that Mrs. Sawdy executed a warranty deed to the defendant under which she could be called upon to protect the defendant against the mechanic's lien, gave her such an interest in having the plaintiffs' claim paid as entitled the plaintiffs to enforce the agreement made by Mrs. Sawdy with the defendant for their benefit;

That the fact that the plaintiffs did not avail themselves of the right to file a mechanic's lien did not affect their right to enforce the defendant's agreement. Money paid upon account of a bill consisting of a number of items will, in the absence of an agreement to the contrary, be applied on the oldest items.

APPEAL by the plaintiffs, Harvey J. Hurd and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Erie on the 16th day of September, 1903, upon the report of a referee reversing a judgment of the Municipal Court of the city of Buffalo, in favor of the plaintiffs, and dismissing the plaintiffs' complaint upon the merits.

J. W. Russell, for the appellants.

Charles F. Tabor, for the respondent.

HISCOOK, J.:

This action was brought by plaintiffs to recover from defendant an unpaid balance for lumber claimed by them to have been delivered to Edson B. Sawdy and Emma A. Sawdy. They base their right to recover upon an agreement between defendant and said Sawdys, whereby it is alleged that defendant, for a good consideration, agreed to pay certain debts for which the Sawdys were liable and which included the balance in question due to plaintiffs.

The learned referee before whom the case was last tried dismissed plaintiffs' complaint upon the ground that in the case of Edson B. Sawdy no sufficient consideration moved from him to defendant to support the agreement, and that in the case of Emma A. Sawdy there was no such liability upon her part for the indebtedness due plaintiffs as would permit them to take advantage of the agreement made by defendant within the principles laid down in the case of *Laurence v. Fox* (20 N. Y. 268) and other similar decisions. We think that this view was based upon error and that the judgment must be reversed.

Although this case involves a small amount of money and comparatively few and simple questions, it seems to be difficult to reach a result upon the trial thereof so sustained by the law and the facts that it can be affirmed upon review. The case has been three times tried and this court has been compelled to reverse for error two judgments secured by plaintiffs upon such trials. Such prior appeals are reported respectively in 56 Appellate Division, 595, and 76 Appellate Division, 506. While we shall have occasion hereafter to refer to the opinion delivered upon the last appeal, it is not necessary to the consideration of the questions now presented that

we should at length discuss the former opinions delivered by this court.

Prior to December, 1895, plaintiffs were lumber dealers in the city of Buffalo. In November of that year the defendant Wing and his wife conveyed to Edson B. Sawdy the premises referred to in this litigation and situate in Buffalo. January 13, 1896, said grantee executed a conveyance of the same premises to Emma A. Sawdy, who was his wife, and that conveyance was put on record the same day. Upon the original instance and request of Edson B. Sawdy plaintiffs sold and delivered upon the premises in question between December 9, 1895, and March 26, 1896, lumber of the value of \$1,345.91. Upon the trial it was conceded that all of the lumber was used in the construction of two houses upon the premises except certain specified items which were estimated by various witnesses to be of various values ranging in the aggregate from \$32.27 to \$285.32. Of the total amount there seems to be no dispute that lumber of the value of \$705.87 was delivered, and, subject to the shortage above mentioned, went into the construction of the houses after the execution of the deed by Sawdy to his wife. By payments made from time to time by the defendant the total indebtedness for this lumber had been before May 6, 1896, reduced to a balance of \$320.91.

May 6, 1896, Mrs. Sawdy and her husband executed a warranty deed of the property to the defendant Wing, and in purported consideration thereof and as part of said transaction the latter executed back an agreement whereby in substance, amongst other things, he agreed to "assume and pay all valid claims for labor and for all material used by first parties (the Sawdys) for the construction of houses and buildings thereon and to save and protect first parties harmless from each and all said claims or demands thereon." Annexed was "an approximate statement of the claims for labor and materials furnished * * * and * * * intended to be assumed by second party" (Wing), and which included the sum of \$375 due to plaintiffs, and which item undisputedly was intended to represent the same indebtedness sued for here.

It is upon this agreement that plaintiffs base their action.

As already stated, the plaintiffs were defeated upon the trial upon the ground that, so far as Edson B. Sawdy was concerned, the

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defendant received no consideration for his agreement, and that so far as Emma A. Sawdy was concerned, she was not in any such manner liable for or legally interested in the payment of the indebtedness as would enable plaintiffs to take advantage of defendant's contract with her.

We think this disposition was correct so far as the husband was concerned. Apparently he parted with all of his interest in this land by his conveyance to his wife, and at the time of the deed to defendant had no transferable interest which might serve as a consideration for the purported agreement. It is true that upon the trial plaintiffs' counsel attempted to take a position inconsistent with his pleadings and with the general trend of the evidence by showing that prior to 1903 Mrs. Sawdy never knew of, accepted or acted under the deed from her husband. This evidence was, however, ruled out.

It is in connection with Mrs. Sawdy's relations to the indebtedness due to plaintiffs that we think the referee fell into error. Without attempting to decide whether a trial court might have found upon a question of fact that plaintiffs could have maintained an action against Mrs. Sawdy personally for the balance due them when the deed to Wing was executed, we think the evidence tended to establish that at said date they could have filed a mechanic's lien for said balance against the property which she was conveying, and that such right, in connection with the other facts, furnished a sufficient basis for defendant's promise to pay and protect her from said indebtedness.

The deed was executed May sixth. The payments upon the total bill, in the absence of some contrary arrangement, must be assumed to have been applied to the oldest items. There was evidence that within ninety days next preceding the date of defendant's agreement sufficient lumber had been delivered and put into the houses to make up the balance claimed.

We think, further, that certainly a trial court might find as a matter of fact that this lumber was so put into the erection of these houses, after Mrs. Sawdy took title, with her knowledge and consent, that a mechanic's lien would lie against her property therein.

It is true, as suggested by the learned referee, that there is no

legal objection to a husband building upon his wife's land if he so desires, and that she does not necessarily become liable to pay for such building. We think, however, that it would not be violent to assume, under ordinary circumstances and in the absence of evidence indicating the contrary, that a wife having the title to and possession of real estate upon which are being completed buildings in the process of erection at the time of the conveyance to her by her husband is to be charged with knowledge of such construction, and that materials are being used for such purpose. In this case, however, evidence was either introduced or offered directly tending to show Mrs. Sawdy's knowledge of the fact that lumber furnished by plaintiffs was being used for her benefit in the completion of the houses in question. The very agreement upon which plaintiffs base this action, and to which she was a party, admits and recites in substance that there was a balance due plaintiffs of \$375 for material used by her and her husband in the construction of houses and buildings upon the premises. The order upon defendant to pay plaintiffs, dated January 15, 1896, and marked Exhibit 2 for identification, and which in our judgment was erroneously ruled out, was signed by Mrs. Sawdy as well as her husband, and directed the payment of a certain sum "in consideration of lumber and building material furnished by Hurd Bros. to *me* for use in said building," referring to the buildings in question. It seems to us, therefore, that it might have been found that at the time of the conveyance to Wing plaintiffs were entitled to file a mechanic's lien for the balance due them for materials.

The conveyance to defendant was a warranty deed, and under it Mrs. Sawdy could have been called upon to protect and defend him against enforcement of such lien upon the property conveyed, and the agreement made by him to pay and discharge said claim was one of the proper methods to relieve her from the liability to which she otherwise might have been subjected upon her covenant of warranty. We think that her interest in having the indebtedness paid was of a degree and character sufficient to make defendant's agreement for the benefit of plaintiffs legal and binding and gave them a right to enforce the same. (*Embler v. Hartford Steam Boiler Ins. Co.*, 158 N. Y. 431, 436.)

It is suggested further in behalf of defendant, that the time has

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long since elapsed within which plaintiffs might file a lien and that they never did so file the same, and that this is an answer to plaintiffs' contention in this respect. We do not, however, regard this as a sound view. Defendant's agreement is to be viewed in the light of the circumstances as they existed at the time it was made and to be decided by the interest which Mrs. Sawdy then had in the payment of plaintiffs' indebtedness. If she then was liable for or interested in its payment within the rules governing this subject, plaintiffs are entitled to enforce the agreement made for their benefit. They have not lost such right because either in reliance upon the agreement or for some other cause, they have not resorted to the proceedings by mechanic's lien. Their right to recover rests upon the obligations existing from Mrs. Sawdy to them at the time she secured the agreement from defendant to protect her against her obligations and liability.

We do not believe that the agreement made by defendant to protect her against this indebtedness, if valid at the time it was made and for which presumably credit was given to defendant in the sale of the house, has been destroyed and canceled simply because the plaintiffs for some reason not explained in the evidence have refrained from filing their lien. If it were profitable so to do in the absence of evidence bearing upon the subject, it would be quite reasonable to conjecture that they have refrained from enforcing their lien for the very reason that this agreement was executed by the defendant to pay their indebtedness.

We think that the pleadings as a whole permit plaintiffs to urge the view of this case discussed. It is true that in their original complaint they alleged that "plaintiffs sold and delivered to the said Edson B. Sawdy upon the premises above described and at his special instance and request," certain goods, etc. This court, however, in its former decision (76 App. Div. 506) held that "While the complaint does not in terms allege that the materials furnished by the plaintiffs went into the construction of these buildings, yet in conjunction with the contract, that is its plain meaning. This interpretation is further made clear by the defendant's answer which alleges that by the contract referred to he became liable for whatever lumber and material sold to Sawdy by the plaintiffs were used in the construction of the said houses, and further admits the delivery of said lumber as

alleged in the complaint and the payment of \$1,025 to them, but avers that such sum paid nearly, if not fully, for all the lumber so used. It is apparent, therefore, that the real controversy between the parties arises over the quantity of lumber used in said dwelling of that delivered by the plaintiffs." We think that it was not inconsistent with or outside of the pleadings, construing them as a whole, for plaintiffs to show that while the lumber in the first instance was sold and delivered upon the engagement of the husband Sawdy, nevertheless some of it was so used in the construction of the houses after Mrs. Sawdy became the owner thereof that she had such an interest in the payment therefor as would furnish sufficient support for defendant's agreement to pay the unpaid balance.

In accordance with the views expressed, we think that the judgment must be reversed and a new trial granted.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

THERESE LUESENHOP, Appellant, v. BARBARA EINSFELD, Individually and as Executrix, etc., of JOHN P. EINSFELD, Deceased; MARIA FRANKENSTEIN and Others, Respondents.

Deed absolute in form executed as security for a debt — agreement by the grantee to reconvey the land within one year on repayment of the debt — execution by the grantor to the grantee of a general release — the grantor cannot subsequently maintain an action to redeem the premises — such a conveyance is not invariably a mortgage — the parties may agree that if the debt is not repaid within the specified time the grantee's title shall become absolute.

November 25, 1873, Theresa Luesenhop conveyed certain real estate to John P. Einsfeld. The conveyance, although absolute on its face, was given as security for an indebtedness of \$1,000, and concurrently with its execution Einsfeld and his wife executed an agreement by which they agreed to reconvey the property one year from the date of the agreement or sooner, provided the said Luesenhop paid the indebtedness. The agreement further provided that

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Luesenhop should have the occupancy of the premises during the term, and that she should pay the taxes and insurance and make all necessary repairs to the buildings on the premises.

In November, 1874, Einsfeld without, so far as appeared, making any special agreement with Luesenhop, entered into possession of the premises. He continued in such possession, claiming to own the property, paid off the incumbrances which were liens against the property amounting to upwards of \$3,000, paid all the expense of repairs and maintenance, and generally exercised all the rights and discharged all the obligations of an owner.

In 1886 negotiations were had between Einsfeld and Luesenhop, which resulted in the payment to her by Einsfeld of the sum of \$1,500, and the execution by her to Einsfeld of a release by which she discharged the said Einsfeld from all claims "in law or in equity," and from all "manner of * * * claims * * * upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these presents."

At the time of the execution of the release, Einsfeld claimed to be the absolute owner of the property, and the only matters in dispute between the parties were the claims growing out of the conveyance of the property.

Thereafter Einsfeld made valuable improvements upon the premises and paid the taxes and insurance. He continued in possession until his death in 1891. In 1893 Luesenhop brought an action against Einsfeld's executor and devisees to compel an accounting with respect to the premises and a reconveyance of the premises upon payment of the sum found due.

Held, that the plaintiff was not entitled to the relief sought;

That there was an entire lack of equity in the plaintiff's case;

That the release executed by the plaintiff to Einsfeld operated to extinguish whatever rights the plaintiff had in the premises;

That the fact that Einsfeld and his successors had upon the faith of the release incurred expense in maintaining and improving the premises, and could not be placed in the situation in which they were before the release was executed, was fatal to the plaintiff's right to demand a reconveyance.

semble, that every agreement to reconvey upon the payment of a certain sum within a specified time does not constitute a mortgage, and that the parties may execute such conveyance with the intention that the title shall become absolute, and the right of redemption determine, upon default after the expiration of the time for payment, and that if such intention actually appears full effect will be given to it; that in the absence of such intention appearing, equity would construe the transaction as a mortgage with the right to redeem.

HISCOCK, J., dissented.

APPEAL by the plaintiff, Therese Luesenhop, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Erie on the 2d day of July, 1902, upon the decision of the court, rendered after a trial at the Erie Special Term, dismissing the plaintiff's complaint upon the merits.

The defendant Barbara Einsfeld died during the pendency of the action, but no substitution has been made in her place.

The facts stated in the head note will in part be found in the dissenting opinion of Hiscock, J.

Eugene Van Voorhis and John Van Voorhis & Sons, for the appellant.

Charles Diebold, Jr., and Fisher, Coatsworth & Wende, for the respondents.

STOVER, J.:

The complaint alleges that on the 25th day of November, 1873, plaintiff made and delivered to the defendant Einsfeld's testator, John P. Einsfeld, a conveyance of certain real estate in the city of Buffalo, said conveyance being absolute upon its face ; that such conveyance was made for the purpose of securing the payment of the sum of \$1,000 due from plaintiff to Einsfeld ; that said Einsfeld thereafter entered into possession of said property, and continued in possession until the time of his death ; and it demanded an accounting of the rents and profits of the property, and an adjudication that the plaintiff be entitled to a reconveyance of the property upon the payment of the sum found due. The conveyance was executed on the date above stated, and on the same date an agreement was entered into between John P. Einsfeld, Barbara, his wife, and the plaintiff herein, which agreement recited the indebtedness and the conveyance, and contained a stipulation on the part of John and Barbara Einsfeld that they would reconvey the property one year from the date of the agreement, or sooner, provided the plaintiff paid and discharged the debt ; and further providing that the plaintiff herein should have the occupancy of the premises during the term, she agreeing to pay the taxes and insurance premiums, and make all necessary repairs, etc., to the buildings.

Einsfeld entered into possession of the property in November, 1874. The plaintiff testified that she received the rents from the property for four months after the execution of the conveyance to Einsfeld. Einsfeld continued in possession of the property, claiming to own it, paid off the incumbrances which were liens against the property at the time of the taking of the conveyance, which amounted to upwards of \$3,000, paid all the expense of repairs and

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maintenance, and generally exercised all the rights and discharged all the obligations of an owner.

The evidence does not show any special agreement made between the parties at the time Einsfeld entered into possession of the property, Einsfeld at the time of the trial being dead, and the plaintiff being disqualified as a witness in regard to the personal transactions. The testimony for the plaintiff rests, so far as oral proof is concerned, almost entirely upon the evidence of the plaintiff's daughter, who details conversations and transactions had with Einsfeld, but there is no explanation of the possession by Einsfeld upon the expiration of the year after the conveyance of 1873. It does not appear that any further transactions took place between the parties until the year 1886. It is alleged that at that time the plaintiff, with her daughter, called upon Einsfeld and requested a settlement of the claims.

The evidence fairly shows, we think, that at the time of this meeting Einsfeld claimed to be the absolute owner of the property, and that some discussion was had with reference to the claims; giving the discussion the most favorable view for the plaintiff, it must be fairly said that Einsfeld claimed to be the owner of the property, and that the settlement, which is hereafter referred to, was made with that understanding.

The result of the negotiations was a release executed by the plaintiff, by which she released and discharged the said Einsfeld from all claims "in law or in equity," and from all "manner of * * * claims * * * upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these presents."

It is undisputed that at the time of the execution of this release this real property and the claims growing out of the conveyance thereof were the only matters in dispute between the parties. At the time of the settlement the plaintiff was acting under the direction of an attorney who appeared for her, and was present at the interview between her and Einsfeld, and who drew the release referred to. His testimony is to the effect that the interview was arranged for the purpose of adjusting the differences growing out of the conveyance. At the time of the execution of the release the consideration of \$1,500 was paid by Einsfeld to the plaintiff.

The trial judge has found that the release was executed with the intention that Einsfeld should thereby acquire all the right, title and interest of the plaintiff in the premises in question. He further found that after said accounting and settlement Einsfeld and his successors in interest made valuable improvements upon the premises, and paid taxes and insurance for said premises. He also found that the rental value of the premises in 1873 was forty-five dollars and eighty-three cents per month.

The plaintiff's case rests upon the proposition that the conveyance by the plaintiff, and the execution of the agreement to reconvey, constituted a mortgage, and that Einsfeld acquired no legal title to the property by reason of the subsequent transactions. This view ignores other, and, we think, controlling features of the transaction. In the adjudging of these transactions, as in others of like character, the primal and controlling consideration is the intention of the parties. If it can be gathered from the agreement that the parties intended to transfer a title, intended that the title should vest in Einsfeld, and treated the property after the transaction as though the title had vested in Einsfeld, no valid reason is given why this intention should be defeated. The claim that the written papers did not sufficiently convey a legal record title is not of itself sufficient to defeat the intention, for the contract having been performed, a fair consideration paid, with the intention that the title should vest in Einsfeld, the court would, under well-known principles, either of estoppel or enforcement of executed agreements, adjudicate the legal title to be where it properly belonged. The plaintiff, for nearly twelve years after Einsfeld entered into possession of the property as owner, made no claim whatever, so far as the record shows, for a reconveyance of the property. Then, for some reason, a claim is made, and upon negotiations entered into, and full legal advice, the release was executed, with the intention above stated. No further steps were taken by the plaintiff to enforce any actual or supposed right in the premises until after the death of Einsfeld, and then, after a silence of seven years, and two years after the death of Einsfeld, this action is commenced. Still retaining the consideration, she asks to repudiate the contact already entered into by her.

It would seem to be enough to say that there was an entire lack

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of equity in the plaintiff's case; but reliance is had upon the case of *Odell v. Montross* (68 N. Y. 499), and it is sought to place this case within the principle there announced. We take it that the governing principle applied in that case is stated at page 504 of the report, to be this: "A mortgagor and mortgagee may, at any time after the creation of the mortgage and before foreclosure, make any agreement concerning the estate they please, and the mortgagee may become the purchaser of the right of redemption. A transaction of that kind is, however, regarded with jealousy by courts of equity, and will be avoided for fraud, actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining it. It will be sustained only when *bona fide*; that is, when in all respects fair, and for an adequate consideration."

In the case of *Odell v. Montross* it appears that the consideration for the release was fifty dollars, practically nominal, and that the paper under which the right of redemption was claimed to be extinguished was, in its terms, ambiguous; and a discussion is there had as to the strictly legal effect of such documents; and were the facts the same in the case under discussion and the legal effect of the paper only applied, perhaps the contention of the plaintiff might be upheld. But, as above stated, it ignores the rule laid down above, namely, that such agreements may be made and will be upheld in equity, if fair and *bona fide*. In the case of *Odell v. Montross*, in the application of the legal principle, it was held that the agreement there could not be upheld, and that the facts in that case did not bring it within the equitable principle. In the discussion of that case it was said: "Had the defendant, acting upon the faith of this transaction, entered into possession of the premises and incurred expenses, and substantially changed his situation so that he could not be placed in the same situation in which he was before, it might have estopped the plaintiff from taking shelter under the Statute of Frauds, or alleging the insufficiency of the written instrument to carry out the agreement and intent of the parties. But there are none of the elements of an equitable estoppel in the case as presented by the record." So that, in that case, the absence of the equitable principles led the court to apply the rule against the grantee, and it may be said further, while perhaps not as controlling, but as a fair consideration of the case under discussion, that not every agreement to

reconvey upon the payment of a certain sum within a specified time, constitutes a mortgage, but the parties may execute such conveyance with the intention that the title shall become absolute, and the right of redemption determine, so as to vest in the grantee the title absolute, upon default after the expiration of the time for payment, and such intention actually appearing, there is no reason why full effect should not be given to it. While it is true as a general rule that, in the absence of such intention appearing, equity would construe the transaction as a mortgage with the right to redeem, yet such rule is not to be applied where another intention is evident. If it had been intended to rely upon the conveyance as a mortgage, why did Einsfeld's wife join in the agreement to reconvey? It could be fairly said that it was contemplated that a reconveyance was necessary to divest Einsfeld of the title. So, coming to the question of the release, we know of no rule which would render invalid the agreement to regard the deed as absolute upon the payment of the consideration for the release, or that would defeat an agreement to construe the release as extinguishing the right to redeem, and vesting the absolute title in the grantee. The release is broad enough to embrace a release of the equity of redemption. Such an agreement would violate no principle of law and no rule of public policy, and, therefore, it was quite within the power of the parties to bind themselves by such an agreement, and such interpretation, we think, should be given to the release here. It is an agreement made fairly, in good faith and upon a valid and adequate consideration, which has been fully paid and discharged.

The evidence, we think, discloses that at all times after the conveyance Einsfeld insisted that he was the absolute owner of the premises. The plaintiff, at the interview in 1886, claimed the right to redeem. Here was a disputed situation between the parties, and Einsfeld might fairly, without surrendering his position as an absolute owner, have paid the \$1,500 consideration in order to avoid the dispute. Certainly the payment of the \$1,500, and asking for the release from all claims, could not be deemed an acquiescence under the claim of the plaintiff that she was the owner of the equity of redemption, but it should be treated as a settlement of disputed matters, leaving Einsfeld in full control and ownership of the prem-

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ises and the plaintiff with the consideration for the settlement and acknowledgment of Einsfeld's rights as owner.

Another feature which we think takes this case out of the principle of *Odell v. Montross* is that Einsfeld and his successors have, upon the faith of the transaction, continued in the possession of the premises, incurred expense and substantially changed their situation, so they could not be placed in the same situation they were before the agreement was made.

It is hardly necessary to discuss in detail this feature of the case. There is no dispute as to the facts. All taxes, assessments for improvements and the expense of the maintenance of the property were borne by Einsfeld during his lifetime, and by his executor after his death, up to the commencement of the action. It would seem impossible to restore Einsfeld or his successors to the position which he occupied prior to the making of the agreement in question. This feature of itself, it would seem, takes the case out of the principle of *Odell v. Montross* if it were necessary to reconcile this case with the adjudication there. The case of *Odell v. Montross* is a case which perhaps may be considered a border case. Some discussion was there had as to the legal effect of conveyances, and the principle was applied as rigidly perhaps as in any adjudicated case, but it did not attempt to relax or ignore the basic principle that full effect is to be given to the intention of the parties to an agreement which violates no principle of law and is not against a rule of public policy, but, upon the contrary, the principle is reiterated that all agreements of that kind, when once established, will be upheld. And in that particular case it was held that the grantee showed no equitable rights which would suffer by reason of the enforcement of the legal rule, and, therefore, it was applied in that case, the statement there being that no injustice would be done to the defendant by the conclusion reached; but in the case under discussion it is impossible to see how a gross injustice would not be done to the successors of Einsfeld were the plaintiff permitted to recover in this action. It perhaps is more profitable to apply the generally accepted rules of law and equity in the consideration of this case than to endeavor to square it with a dissimilar case which is quoted as a precedent. Precedent, if without principle to sustain it, cannot be regarded as authority, and, as we have seen, the case

cited varies in such essential particulars from the one under consideration that it is not of a nature to be controlling.

The judgment should be affirmed, with costs.

All concurred, except Hiscock, J., who dissented in an opinion.

Hiscock, J. (dissenting) :

This action was brought by plaintiff to effect a redemption of certain real estate situated in the city of Buffalo formerly conveyed to her by one John P. Einstfeld, and to procure an accounting between plaintiff and said Einstfeld and the present defendants of moneys paid out or received on account of the plaintiff. The principal basis of the decision made by the learned trial justice denying plaintiff's prayer for relief, was in effect that she had a settlement with said Einstfeld whereby and in pursuance whereof she had released all claims against him, including any rights in said real estate or to redeem the same. I think that error was committed in this determination which calls for reversal of the judgment.

The undisputed evidence and findings of fact made upon the trial established, amongst others, the following facts :

In 1873 plaintiff procured a sum of money from Einstfeld and executed to him a deed absolute in form of the premises in question. Simultaneously, however, an instrument of defeasance was executed back giving the right to redeem within a limited time. This transaction concededly amounted to a mortgage by plaintiff of her property. A short time subsequently Einstfeld entered into possession of the mortgaged property, thereafter receiving and enjoying the rents and profits and making certain payments for taxes, interest, etc. Plaintiff moved away from the city of Buffalo to Cincinnati. While living in the latter place she sent her husband to Buffalo to get an adjustment of matters with Einstfeld, and he did obtain from the latter \$150 of which he made no account to his wife. In 1885 or 1886, after the death of her husband, plaintiff found in an unknown drawer the papers constituting the original transaction between her and Einstfeld and soon thereafter came to Buffalo to secure a settlement with Einstfeld and a reconveyance and possession of her real estate, and after various negotiations and an examination of Einstfeld's accounts with plaintiff and the property, an adjustment was arrived at between the parties whereby Einstfeld paid to plaintiff

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the sum of \$1,500, and she executed to him a general release which was in the ordinary form of all claims and demands whatsoever in law or in equity, but contained no specific reference whatever to said real estate or her right, title and equity of redemption therein. Although requested, plaintiff refused to execute any deed or conveyance of her property. Einsfeld continued in possession of the property until in 1891 when he died leaving a last will and testament by which the parties now named as defendants succeeded to his interest in said real estate. During the time which elapsed between said settlement and Einsfeld's death he paid out various sums on account of said property by way of taxes and assessments for paving and sewer improvements, but spent no considerable sums in altering or repairing the buildings upon the property. The findings made by the learned trial justice that he and his successors made valuable and permanent improvements upon the premises must be held to largely relate to and cover the payment of taxes and assessments levied upon the premises for the undisputed evidence shows that outside of said expenditures no substantial sums were spent.

At the time of the settlement aforesaid, upon plaintiff's demand for a reconveyance of her property Einsfeld represented that he had conveyed away the same and also that he had failed or become financially irresponsible. Although these representations were not true plaintiff believed the same as expressly found by the trial court and did not discover their falsity until after Einsfeld's death. In 1893 this action was commenced.

It follows from the foregoing facts that plaintiff's original conveyance to Einsfeld was a mortgage and that she is entitled to have an accounting with, and redemption of her property from the defendants as successors of Einsfeld, unless the same has in some manner been cut off or lost. It is urged in behalf of respondents that this result was accomplished by the settlement and release executed in 1886 and already referred to, but I am not able to accept or agree with that view.

Although the mortgage which plaintiff executed and which was put upon record was in form an absolute deed, she still retained title in fee to the premises covered thereby subject only to the conveyance as a mortgage and upon payment of her indebtedness would

have been entitled to compel the execution of a reconveyance or of such other instrument as would perfect her record title. A mere release general in form such as plaintiff executed to Einsfeld was not sufficient to convey to him her title to said premises and to cut off her equity of redemption therein. She could only be divested of it (except by way of estoppel) by some instrument which would be valid under the Statute of Frauds and in compliance with the statute prescribing the mode and manner of conveying lands. Her right of redemption was not in any sense a "claim or demand" which would be cut off by the general release. (*Odell v. Montross*, 68 N. Y. 499.)

Therefore, if the transaction between the parties has operated to cut off plaintiff's right in said premises it must be upon some other theory than that just discussed, of a conveyance of transfer.

Upon the trial an amendment of defendant's answer was asked and permitted allowing them to pray for such a reformation of the release executed as would turn it into a conveyance by plaintiff of her interest in said premises, it being claimed that it was the intention of the parties that she should execute such a conveyance. It is apparent from the findings made by the trial justice and it is conceded in the brief of the learned counsel for the respondents that no such reformation of the release was adjudged and plaintiff's complaint, therefore, was not dismissed upon that ground.

It is, however, urged within the suggestions made in the case of *Odell v. Montross*, already quoted, that after the settlement and execution of the release in question Einsfeld and these defendants as his successors expended such sums in the improvement of the premises as to have created an estoppel against plaintiff's enforcement of her claim to the lands; also that owing to the death of Einsfeld it will now be difficult for defendants to make an accounting of his receipts and disbursements on account of plaintiff and said premises; also that there has been *laches* in the commencement of this action.

The last two suggestions may be disposed of first. I think there was no unpardonable *laches* in the commencement of the action. As already stated, plaintiff did not discover the falsity of Einsfeld's representations that he had sold and conveyed away the property until his death sometime in 1891, and this action was

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commenced in 1893. I am not aware of any authority which under the circumstances of this case would defeat plaintiff's right to recover because, owing to the death of an adverse party in interest, it will be more difficult to make proofs in opposition to her claim. Neither am I able to discover that there will be any more difficulty for defendants than for plaintiff in establishing the account. Interest, taxes and insurance are undoubtedly the main items of payment, and these will so be a matter of record in the accounts of third parties that they may be easily proved. The payment of any small sum for repairs made and paid for by Einsfeld may apparently be established with ease by the testimony of witnesses, sworn upon the trial of this case, who had knowledge in regard thereto.

I pass, therefore, to the question of estoppel chiefly urged, that Einsfeld and the defendants had expended large sums upon the property by way of improvements. In the first place, in opposition to defendants' invocation of the defense of estoppel against plaintiff upon principles of equity, it may be recalled that plaintiff was led into making the settlement and executing the release relied upon by the false representations of defendants' predecessor in interest that he had parted with her real estate, and, therefore, could not reconvey it. It would be a somewhat strange and anomalous application of the principles of equity to allow defendants to build up the defense of estoppel against plaintiff upon acts which it is fair to state she was induced to perform by the fraud and misrepresentations of the predecessor through whom defendants claim.

Passing by this consideration, however, I am unable to perceive facts in this case which would constitute the defense of estoppel within the rule suggested in the *Odell case*. Einsfeld did not go into possession of the property upon the faith or strength of the settlement made with plaintiff. He was already there. He simply continued in possession, and continued to do precisely as he had been doing, and as he would have done if no settlement had been attempted. It has already been pointed out that the evidence shows conclusively that he expended no considerable sums for repairs or alterations of the property; that his main expenditures were in the payment of taxes, interest and insurance, such as any mortgagee in possession would be apt to pay. As against these payments he and the defendants have had the possession of the property and the ben-

efit of the rental value thereof. If upon a proper accounting it shall be found that the disbursements, including the amount paid plaintiff in 1886, exceed the amounts received, defendants can be amply and entirely protected by the striking and payment of such balance as the ordinary and necessary condition of plaintiff's redemption of her property. It seems to me that there is nothing in respondents' situation with reference to the property now or during the occupancy of it by them and their predecessor which cannot be perfectly considered and taken care of upon an accounting such as usually accompanies a redemption of real estate from a mortgages in possession; that there is nothing which prevents them from being restored to the position which was occupied by Einsfeld at and before the date of the settlement made between him and plaintiff, and that, therefore, there is not found in any alleged defense of equitable estoppel a reason for denying to plaintiff the relief which she seeks.

In accordance with these views I think the judgment appealed from should be reversed and a new trial granted, with costs to appellant.

Judgment affirmed, with costs.

JOHN E. LEGGETT, Respondent, v. THE CITY OF WATERTOWN,
Appellant.

Negligence—construction by an abutting owner of a platform encroaching upon a city sidewalk—pedestrian injured by the collapse of the sidewalk and platform—the city is liable for defects in the sidewalk but not for defects in the platform—admissibility of an affidavit made by a witness as to what another witness had said to him.

In an action brought against a city to recover damages for personal injuries it appeared that the city maintained a sidewalk leading to a bridge; that an owner of property abutting on the approach to the bridge had constructed in front of his premises a wooden platform, which as claimed by the plaintiff rested upon the sidewalk; that while the plaintiff was standing with one foot on the steps of the platform and the other foot upon the sidewalk, the platform and walk collapsed precipitating the plaintiff into a hole fifteen or twenty feet deep and causing him to sustain injuries.

Held, that it was improper for the court to charge that the plaintiff could recover if the jury found that the platform was in any way connected with the sidewalk, and the injury resulted from a defect either in the platform or the sidewalk;

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That the city was not liable for defects in the platform, but only for defects in the sidewalk;

That it was liable for any defect in the sidewalk; whether such defect was inherent in the sidewalk itself or was due to the conjunction of the platform with the sidewalk.

That it was improper to permit the plaintiff to introduce in evidence, for the purpose of contradicting the testimony given by a witness for the defendant, an affidavit made by such witness which, in addition to the statements about which such witness had been examined, contained an account of a conversation which the affiant had had with another witness in respect to which conversation the other witness was not examined.

MCLENNAN, P. J., and SPRING, J., dissented.

APPEAL by the defendant, The City of Watertown, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Jefferson on the 3d day of February, 1902, upon the verdict of a jury for \$800, and also from an order entered in said clerk's office on the 1st day of February, 1902, denying the defendant's motion for a new trial made upon the minutes.

Fred B. Pitcher, for the appellant.

H. Purcell, G. H. Walker and Thomas Burns, for the respondent.

STOVER, J.:

This is an action to recover damages by reason of an alleged defect in a highway. The highway in question is a public street in the city of Watertown, leading to and over a bridge, the point at which the accident occurred being upon premises adjoining and contiguous to the bridge and the sidewalk leading from the bridge in front of the abutting premises. The walk from the bridge leading northerly was supported partly by a wall and by upright pieces of timber.

The evidence showed that adjoining the sidewalk was a platform and steps leading to it, which was used by the abutting owner in conjunction with his property. Between the easterly edge of the sidewalk and the building upon the abutting property, called the Dixon property, was a space of about six feet. This space was occupied by a platform extending from the north end of the bridge and in front of the Dixon premises about twenty feet. The plat-

form was higher than the sidewalk, and was reached by means of three steps which ran along the front of the platform, and occupied about two feet of the width, leaving about four feet of platform between the steps and the Dixon building.

The steps at the westerly end of the platform, and which form the approach to the platform, according to the plaintiff's version, rested upon the easterly edge of the sidewalk, and, as one or more of the witnesses gave it, projected about two inches on the sidewalk.

There was an iron railing at the easterly side of the bridge extending to the southerly side of the platform, and at the north-easterly side of the platform the iron railing was continued along the easterly edge of the sidewalk, the opening in the iron railing being the length of the platform which was used as an approach to the Dixon premises.

At the time of the accident a number of people had collected for the purpose of witnessing an exhibition of daring by a man who had advertised that he would jump from the top of the bridge into the river below.

The accident occurred on Memorial Day, 1898. The testimony of the plaintiff is that as he was passing down the street and came to the bridge he saw a large crowd there; that the crowd was so large on the walk it was impossible to get through, so he took the roadway across the bridge; that he pushed his way through there, and after he got across the bridge he undertook to get on the board walk again; and finally, after working through, he got as far as the Dixon property, and owing to not having his truss on he found he had trouble from a rupture in the groin; that he put his foot upon one of the steps and leaned over, and made a pressure with his thigh to adjust the breach; that when he had been there but a minute or two the crowd came and rushed onto the board walk, and he was standing with his left foot upon the bridge walk, when the walk and platform and all went down, and he went with it. Beneath the platform on the Dixon property was an open space about fifteen to twenty feet deep.

The evidence as to the condition of the walk after the accident is somewhat conflicting. The walk itself did not fall, but some of the witnesses testified that it sank on the easterly side when the plat-

form gave way, and the boards were tipped up, the lower portion being towards the easterly side of the walk. The evidence showed that the plaintiff was injured by the fall.

This case was before this court on a former appeal (55 App. Div. 321). Upon that appeal a judgment of nonsuit was reversed and a new trial ordered. The rule governing the case as presented upon that appeal, and which was necessary to the decision of that appeal, was as follows: "It was the duty of the municipality to construct and maintain sidewalks over and along its thoroughfares which should be reasonably safe for the use of such pedestrians as had occasion to pass over them; and if it knowingly permitted the safety and efficiency of any of its walks to become in any manner impaired, either by their own inherent infirmity or by the conjunction of an unsafe structure erected by an adjoining owner, it violated its plain duty and subjected itself to the consequences which flowed therefrom."

This is the correct rule and should have been applied upon the retrial of the case. This rule was charged almost verbatim by the trial court, but in connection therewith this language was used: "So if you find that the plaintiff received his injury upon that occasion through a defect in that sidewalk or through a defect in the structure in connection and conjunction therewith, this platform and the surroundings and the structures and the timbers that are about it, if he received his injury from either of those causes, then you must find a verdict, if you find the other questions, in favor of the plaintiff. That I charge you to be the law in this case; that it makes no difference whether it was from the defective condition of the sidewalk or from the defective condition of the platform and steps and structure, if he received his injury from that and —" Plaintiff's counsel: "Your Honor, in conjunction — The Court: I have already said in conjunction with the sidewalk. I think I have charged that plain enough. If I have not, I will charge that later on. If you should find in this case that the plaintiff is right, in other words, that the plaintiff was free from contributory negligence, that the city, the defendant, had actual notice of more than twenty-four hours of the unsafe condition of this sidewalk —" Plaintiff's counsel: "Forty-eight hours. The Court: Forty-eight hours, of this sidewalk, and that from that defective condition of the sidewalk or

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the structure connected therewith, he received his injury, you will then approach the question of damages."

Again, the court was asked to charge that if the jury found that the sidewalk remained intact at and during the accident, there could be no recovery. "The Court: What do you mean by intact? Do you mean the sidewalk itself or this structure and its connections with the other structure, if there was connection?" Defendant's counsel: "No, I mean the sidewalk between the roadbed and the railing and the Dixon steps. The Court: If you mean simply the planks of the sidewalk itself remained intact, I refuse to charge it in that way."

And so, when asked to charge that if the jury found the sidewalk remained intact and that the plaintiff if he had continued with both his feet upon the sidewalk would not have suffered the accident in question, there could be no recovery, the court again said: "I will so charge in case they find that there was no connection between this other structure and the sidewalk."

When asked again to charge that if the injury came to the plaintiff from causes outside of the highway there could be no recovery, he charged that that would be so, if not connected with the highway in any manner.

Again, when asked to charge that it was immaterial whether any of the planks were or were not decayed, the request was refused, and it was left to the jury to say whether it was material or not.

And finally, when requested by defendant's counsel to charge that the defendant was only liable for its structure and its safe maintenance, the court charged: "I charge the jury on that question that the defendant is liable for either by their own inherent infirmity of the sidewalk and its structure, or by the conjunction of an unsafe structure erected by an adjoining owner; that is the Dixon property in this case."

So the instruction to the jury was substantially that if they found the platform or structure adjoining the sidewalk was in any way connected with the sidewalk, and the injury resulted from a defect either in the platform or the sidewalk, there could be a recovery by the plaintiff.

We think this was an erroneous interpretation of the rule of law. The defendant owed the duty to keep the highway in repair. It

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was under no obligation to see that adjoining owners maintained safe structures as approaches to the highway. Defendant had no authority outside the confines of the highway, and it could not undertake to repair such structures. And in stating this, we are not unmindful of the duty imposed upon municipalities to guard against open, apparent dangers abutting upon the highway, and the circumstances which impose upon municipalities the duty of erecting barriers. But we think no case can be found where a municipality has either been charged with the duty of maintaining an approach to its sidewalk upon private property, or compelled to incur the responsibility of barricading owners of property against access to or egress from their premises, when, in the judgment of the municipality or its officers, their approaches were not of a proper character. Such a construction of the law would be imposing a new burden upon municipalities with respect to the care of highways.

The true rule as above laid down would impose upon a municipality the burden of seeing that its own walk did not become dangerous by reason of the illegal erection of a structure upon it. So that if by reason of the erection of the platform and steps the structure connected with the Dixon property, the efficiency of the highway had been so impaired as to render it dangerous or liable to produce injury, the city would be liable for results occurring by reason of the impairment of the walk itself; but it would not be liable for injuries resulting from defects in the platform or the steps so long as it maintains its highway to a proper degree of efficiency and safety.

The difficulty seems to have been in giving too broad an interpretation to the words "by the conjunction of an unsafe structure." The city was not liable for the defects of the structure of the adjoining owner, but it is liable only for the defects of its own structure, and its liability is confined to that. Whether the defect was inherent in the sidewalk itself, or was created by a conjunction with the sidewalk, is immaterial; but it is quite material as to the location of the defect. It may be that the cause of the defect may not be material, but the defect itself must be in the sidewalk; and the sidewalk being proper and reasonably safe, the municipality cannot be charged for defects existing in the adjoining platform or structure.

An examination of the record satisfies us that the case was presented to the jury upon the theory that the city was liable for any defect, whether existing in the sidewalk or the platform connected with it; and if we are right in the propositions above stated, this was error which was necessarily prejudicial to the defendant.

A witness for the defendant had made an affidavit which it is claimed by the plaintiff was contradictory to the testimony given upon the trial. It contained other statements than those about which he was questioned. The affidavit was offered in evidence, and was admitted, under the objection of the defendant.

We think this was error, as the affidavit contains some statements giving a conversation which affiant had with one Phippin, superintendent of public works, who was also examined as a witness upon the trial, and giving a statement of what Phippin said to him at the time and with regard to which Phippin was not examined upon the trial, saying, among other things, that he (Phippin) "couldn't go home and rest until it was fixed," and other statements. While, perhaps, this of itself would be insufficient to reverse the judgment, in view of a retrial of the case, we make this comment upon it.

For the reasons above stated, a new trial must be had.

All concurred, except McLENNAN, P. J., and SPRING, J., who dissented.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law only, the facts having been examined and no error found therein.

JOHN N. DRAKE, Appellant, v. FREDERICK C. LAUER and S. WALLACE HAGAMAN, Respondents.

Agreement to assist in procuring State contracts by using influence with public officers — it is void as against public policy — its invalidity may be urged although not pleaded — test of invalidity — receipt of benefits thereunder — what contracts for services before public officers are valid and what are invalid.

A contract made between a contracting firm, which contemplated submitting competitive bids for canal contracts to be let by the State of New York, and a person, who, for some years, had been engaged at Albany in, as he expressed it, protecting corporations against "strike" legislation, by which the contract

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ing firm agreed to pay to such person one-third of the profits which it might realize upon all canal contracts secured by it, in consideration for which such person agreed, by means of his political and social relations and influence with officers of the State of New York, to secure for the contracting firm information, not open to other bidders, from the office of the State Engineer and Surveyor, in regard to the estimates of the probable cost of the work included within the contracts, and otherwise to render assistance to said firm in obtaining contracts and favoritism from State officers during the performance of the work, is void as against public policy.

The contract being one affecting the interests of the general public, the defense that it is void as against public policy need not be pleaded in order to be available.

The receipt of the benefits of the contract by the contracting firm will not preclude it from asserting, in an action brought to enforce the contract, that it is void as against public policy.

In order to render a contract void as against public policy, it should appear that the agreement itself contemplates illegal acts or acts condemned as against good morals or public policy. It is not sufficient that acts are done which might be condemned; the test is the intention of the parties.

Smiley, that contracts which provide for the rendition of fair and open services before public officers are valid, but that contracts which contemplate the rendition before public officers of secret services leading to acts of favoritism or unfairness on the part of such public officers are contrary to public policy.

WILLIAMS and HISCOCK, JJ., dissented.

APPEAL by the plaintiff, John N. Drake, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Monroe on the 2d day of April, 1903, upon the report of a referee dismissing the plaintiff's complaint.

John Van Voorhis & Sons, for the appellant.

S. Wile and P. D. Oviatt (John Desmond, of counsel), for the respondents.

STOVER, J.:

This is an action brought by an assignee for an alleged balance due under a contract for the rendition of services.

The complaint alleges that one C. was employed to assist defendants "in getting contracts from the State, to enable them to perform work for the State upon the said Erie Canal and to assist them in prosecuting such work."

There is no specification in the complaint as to the character of the services which were to be performed by C. in obtaining contracts from the State. There are some allegations with regard to services

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performed by C. after the contract had been let, which services the referee has found to be of slight value.

The answer denies the making of the contract and the rendition of the services.

The referee found that in the fall of 1896 the defendants entered into an agreement with C. to pay C. one-third of the profits which they might realize upon all contracts secured from the State for canal work, in consideration whereof said C. agreed to secure for defendants information from the office of the State Engineer and Surveyor at Albany in regard to the Engineer's estimates of the probable cost of the work for which they contemplated submitting competitive bids, and otherwise to render assistance to said firm at Albany in securing contracts for such work and favoritism from State officers during performance, by means of his political and social relations and influence with such State officers.

He also found that some minor services were rendered, but not at the request of the defendants, nor was it contemplated that such services were to be paid for.

The referee found that the contract was void as against public policy, and that the complaint should be dismissed.

It is urged upon appeal that the objection that the contract was void as against public policy was not raised by the pleadings, and could not be considered. We think the better rule is laid down in *Dunham v. Hastings Pavement Co.* (56 App. Div. 244), namely, "Where the statute is provided for the protection of parties, and the benefit taken thereby may be waived, the defense of invalidity must be pleaded or the defendant cannot avail himself of it. * * * The rule is otherwise, however, where the general public is affected by the violation of the particular statute, or the provisions of any public law; in such case the enforcement of rights arising thereunder is or may be opposed to good morals or a sound public policy, and courts will refuse their aid to parties so contracting, and will in every instance leave them as it found them. In such a case it is not necessarily essential that the illegality be pleaded. Courts of their own motion will interfere and deny the right to any relief thereunder without reference to the state of the pleadings." (*Drake v. Siebold*, 81 Hun, 178; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Kearns v. N. Y. & C. P. Ferry Co.*, 19 Misc. Rep. 19.)

It is urged again that the proof does not warrant the finding that the contract was against public policy.

In order to invalidate the contract it should appear that the agreement itself contemplated illegal acts, or acts condemned as against good morals or public policy. It is not sufficient that acts were done which might be condemned, but the test is the intention of the parties — what acts were contemplated by them to be performed in carrying out the agreement. Here, we think, has arisen an apparent conflict in some of the adjudicated cases. The rule was laid down in *Mills v. Mills* (40 N. Y. 543). In that case the contract was that the plaintiff "would give all the aid in his power, and spend such reasonable time as may be necessary, and generally use his utmost influence and exertions to procure the passage into a law of the said bill heretofore introduced into the Senate of the State of New York, as hereinbefore mentioned, or any other bill to the same end," and it was this feature of the agreement which was condemned as against public policy, the court using this language: "It is not suggested that the plaintiff was a professional man, whose calling it was to address legislative committees. It is not suggested that he had any claim of right, which he proposed to advocate and which right or debt he proposed to transfer to the defendant. He had simply asked of the Legislature the privilege or favor to be granted to him of building and operating a railroad, upon certain streets of the city of Brooklyn. This privilege may be assumed to be of pecuniary value. To procure the passage of such a law for the benefit of the defendant, he undertook to use his utmost influence and exertions. This contract is void as against public policy. It is a contract leading to secret, improper and corrupt tampering with legislative action (citing cases). It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. * * * It tends to subject the Legislature to influences destructive of its character, and fatal to public confidence in its action."

This rule, so far as adjudications are concerned, was held to until the case of *Chesebrough v. Conover* (140 N. Y. 382). In that case the contract was that the plaintiff would assist in obtaining rights, privileges and franchises, and draw up the papers, acts and resolu-

tions "to be presented to parties, to the Legislature and to the common council * * * and go to Albany and use arguments," etc.

In that case it appeared that the plaintiff had no connection with the Legislature; was not a lobbyist; had no acquaintance or influence with any member of the Legislature, and it did not appear that he had any peculiar facilities for procuring legislation; or that he asked or solicited any member of the Legislature to vote for the bills; or that he did anything except to explain them and request their introduction; and that he could do without violating any public policy. It was there said: "It must be the right of every citizen who is interested in any proposed legislation to employ an agent for compensation payable to him, to draft his bill and explain it to any committee, or to any member of a committee, or of the Legislature, fairly and openly, and ask to have it introduced," the holding in that case being, "contracts which do not provide for more, and services which do not go farther, in our judgment, violate no principle of law or rule of public policy."

The distinction between the two cases may be made, and as the language in the earlier case is not applicable to the later case, it cannot be said that the later case has overruled the earlier doctrine. But we think the distinction between contracts which provide for services fair and open, and those which contemplate the rendition of secret services leading to acts of favoritism or unfairness on the part of public officials, is still recognized, and the rule applied accordingly.

So in the case under consideration, the complaint upon its face does not state the character of services which were to be rendered, and the referee has found that the services which were contemplated by the parties were such as would fall under the condemnation of the law; for it needs no argument to reach the conclusion that a contract for services in securing contracts by favoritism from State officers, by reason of social and political relations with such State officers, would be void and against public policy.

An examination of the evidence, while not conclusive, as from the very circumstances evidence of these transactions could not be, shows that it warrants the finding of the referee. The principal service rendered prior to the obtaining of contracts, on the part of plaintiff's assignor, was the obtaining from the office of the State

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Engineer the estimates of the cost of the work, which were not open to other bidders upon the work.

The plaintiff's assignor was not unfamiliar with this class of work, as he has testified that his business in Albany for several years was protecting corporations from legislation which he characterizes as "strike" legislation. So that, the referee having found the fact, and as, under the pleadings, this might properly be raised as a question of fact, we see no error in this disposition of the case.

But the further objection is taken that the defendants are not in position to avail themselves of the illegality of the contract, as they have the fruits of the illegal acts. We are not unmindful of the language of some of the adjudicated cases as to the right of a party to repudiate a contract after having received the fruits of the agreement, yet we are not pointed to any adjudicated case which has held that a contract void as against good morals and public policy, will be enforced as against either party under a rule which is applied only in cases in equity, in order to prevent a failure of justice. But as stated in *Dunham v. Hastings Pavement Co.* (*supra*) where the general public is affected by the violation of the law, courts will refuse their aid to the parties, and will, in every instance, leave them as they found them. If this were not so, courts would be compelled to enforce contracts illegal and void as against public policy, in every instance where a part performance could be predicated. Such cannot be the condition of the law.

The judgment should be affirmed, with costs.

MCLENNAN, P. J., and SPRING, J., concurred; WILLIAMS, J., dissented; HISCOCK, J., dissented in an opinion.

HISCOCK, J. (dissenting):

I am unable to concur in an affirmance of the judgment appealed from, and think the same should be reversed because defendants did not plead the defense upon which judgment was awarded in their favor by the referee. Their answer did not in any manner allege or set forth the claim that the contract upon which plaintiff based his action was opposed to public policy and illegal. The answer did, in addition to various specific denials and allegations not material upon this question, contain a general denial.

I think it must be conceded that it did not appear upon the face

of the complaint or necessarily from the evidence given in behalf of plaintiff that the alleged contract was illegal. No such claim is advanced either in the opinion or the report of the referee or in the brief for the respondents or the prevailing opinion. In fact, the reasoning and arguments adopted exclude such idea.

This being the case, I think that both authority and the general principles of practice and pleadings required that defendants should plead the defense upon which they relied to defeat an apparently valid contract. It would seem as if this rule were plainly and decisively laid down in *Milbank v. Jones* (127 N. Y. 370, 375). (See, also, *Coverly v. Terminal Warehouse Co.*, 85 App. Div. 488.)

Reliance is placed upon *Dunham v. Hastings Pavement Co.* (56 App. Div. 244) as laying down the rule that the defense that a contract is illegal and void because in contravention of good morals or of sound public policy need not be pleaded where the interests of the general public are involved; that the courts in such case will of their own motion refuse their aid to parties so contracting.

Apparently this case does lay down such rule, but the authorities in the appellate courts upon which it relies for this doctrine do not sustain it. In the case of *Drake v. Siebold* (81 Hun, 178) the court placed its decision squarely upon the ground that the invalidity of the contract sought to be enforced appeared upon the presentation thereof by the plaintiff upon the trial and, therefore, it was not necessary to plead its illegality. At the same time this case distinctly holds that if the contract as alleged and proved by a plaintiff is valid on its face the defense that it is in fact against public policy and illegal is not available unless especially pleaded.

The case of *Oscanyan v. Arms Co.* (103 U. S. 261), also cited, is expressly distinguished in the case of *Milbank v. Jones* (*supra*), and it appears that there the complaint was dismissed on the opening of plaintiff's counsel because it appeared therefrom that the contract relied on was illegal.

We, therefore, find that the doctrine of the *Dunham* case not only is not sustained by the authorities referred to, but that it is expressly at variance with the decision of the Court of Appeals.

It is argued by respondents' counsel that this ground of reversal is not available to plaintiff because he did not seasonably object that the defense was not pleaded. There was no opportunity for him so

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to do sooner than he has. The record before us does not disclose that at any time during the trial defendants so urged or suggested this defense as to call upon plaintiff for any objection. So far as can be discovered, all of the evidence offered might be introduced upon and under the other issues raised by the pleadings, and there is nothing to indicate that plaintiff had any notice or warning that the defense in question would be urged until after the report of the referee had been made.

Under these circumstances, I think the judgment should be reversed.

Judgment affirmed, with costs.

ANN O'SHAUGHNESSEY, Respondent, v. THE VILLAGE OF MIDDLEPORT,
Appellant.

Municipal corporation — it does not insure the safety of travelers upon its highways — its duty to remove accumulations of ice and snow from its streets and crosswalks — when a finding that it was negligent in this respect is against the weight of evidence.

Municipalities are not insurers of the safety of travelers on the highway, nor are they bound to anticipate every emergency; they are only required to exercise ordinary care and use ordinary diligence.

The duty resting upon municipal corporations to remove accumulations of ice and snow as it falls from time to time upon their streets is a qualified one, and becomes imperative only when dangerous formations or obstacles have been created and notice of their existence is received by the corporations.

A village cannot be said to be negligent, because, during a period of frequent snow storms and of very cold weather, it failed to remove the accumulated ice and snow from a crosswalk and thus keep the surface of the crosswalk exposed, or because it failed to keep the snow and ice on the crosswalk in a perfectly smooth condition.

When, in an action brought against a municipal corporation to recover damages for personal injuries sustained by the plaintiff in consequence of falling upon snow covering a crosswalk, a finding that the municipal corporation was guilty of negligence is against the weight of evidence, considered.

WILLIAMS, J., dissented.

APPEAL by the defendant, The Village of Middleport, from a judgment of the Supreme Court in favor of the plaintiff, entered

in the office of the clerk of the county of Niagara on the 22d day of July, 1903, upon the verdict of a jury for \$250, and also from an order entered in said clerk's office on the 27th day of August, 1903, denying the defendant's motion for a new trial made upon the minutes.

George F. Thompson and G. R. Sheldon, for the appellant.

George D. Judson and H. G. Richardson, for the respondent.

STOVER, J.:

This action is brought for injuries received from a fall upon a crosswalk, which was alleged to have been in an unsafe condition, by reason of the failure of the defendant to discharge its duty.

The plaintiff, a large woman, weighing 175 pounds, while walking on the crosswalk, on the 11th day of February, 1902, slipped, fell and sustained injuries.

The crosswalk in question leads from a bridge which crosses the canal, across a street running along the side of the canal, and has a descending grade from the bridge to the sidewalk on the opposite side of the street.

The plaintiff's testimony is that she was picking her way, for it was slippery and "hunky," and her feet suddenly slipped from under her, and she fell.

The evidence showed that the weather had been very stormy for two or three weeks prior to the time of the accident, snow having fallen every day or two from the twenty-first day of January to the date of the accident; that on the sixth of February there were fourteen inches of snow on the ground; that an inch and a half of snow fell on the seventh; that on the eighth six inches of snow fell, and that there were twenty inches on the ground; on the ninth half an inch of snow fell and on the tenth an inch of snow, making twenty-one inches on the ground; that on the eleventh there were twenty and one-half inches of snow on the ground. Teams had traveled the street across the crosswalk, leaving some ridges of snow where the runners of the sleighs had passed.

The evidence of one of the plaintiff's witnesses was that a severe storm occurred on the twenty-second of January, and he thought the snow on the tenth of February was equal to it.

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The evidence further showed that for a week prior to the accident the temperature had been below the freezing point, ranging from one to twenty-four degrees.

The plaintiff explains that in using the word "hunky" she means uneven, and that such unevenness was caused by the people walking over the snow.

The evidence is practically uncontradicted that it was a season of storm and snow fall, with low temperature.

Some of the plaintiff's witnesses testified that they did not know of the walk having been cleaned, and, under objection, some of the witnesses were allowed to testify that they thought it had not been cleaned or shoveled during the winter. The testimony of the street commissioner of the village was that he cleared the walks of the village, employing all the help he could get, and that the day before the accident he shoveled this crosswalk himself; that it was not shoveled down to the bottom, because to do this would involve the removal of the snow from the street, or render the street impassable for teams, but that he leveled the crosswalk and kept it level with the roadbed; that the snow at this point was about eight inches in depth, and that the snow on the level was three or four feet in depth. He also testified that the walk was shoveled on the tenth of February.

It is quite clear from the testimony that plaintiff received her injury from slipping upon the crosswalk, and the question presented in this case is whether negligence can be predicated against a village for not removing snow from crosswalks during the stormy portion of the winter.

It is frequently difficult to distinguish between adjudicated cases, nor is it always profitable to labor to reconcile adjudicated cases rather than apply well-settled rules of responsibility.

The duty resting upon municipal corporations to remove accumulations of ice and snow as it falls from time to time upon their streets is a qualified one, and becomes imperative only when dangerous formations or obstacles have been created and notice of their existence has been received by the corporations. (*Harrington v. City of Buffalo*, 121 N. Y. 147, citing *Taylor v. City of Yonkers*, 105 id. 209; *Kaveny v. City of Troy*, 108 id. 571.)

In our climate it is impossible to prevent the accumulation of ice

and snow during the winter season, or to remove such accumulations at all times.

The case under discussion is a fair illustration of the difficulties encountered in an endeavor to keep streets in a passable condition during the winter. In the large cities of the State provision is made for the removal of the snow from the streets, and yet, with large sums of money and convenient methods, it is matter of common knowledge that the larger municipalities are unable to prevent accumulations of snow and ice which lay for days and weeks, despite the greatest efforts to accomplish its removal. In smaller places, and localities where snow storms are more frequent, the removal of snow is impracticable if not quite impossible, so that such provision must be made for the use of the streets with the accumulations of snow and ice, as may be practicable and reasonable. As to the sidewalks the snow may be removed, but as the removal of snow from crosswalks would involve a more dangerous condition to the teams and pedestrians than to allow them to remain untouched, as the removal of the snow and ice would form channels, or if ridges in the snow were left simply for the use of teams, the obstruction thus created would be dangerous to pedestrians, so it is quite common to find the snow leveled in the street, and the crosswalks approached either gradually, or kept on a level with the sidewalks.

These observations would seem to be apparent upon the mere suggestion of the situation, but it has been thought advisable to state them here, inasmuch as the argument is made that it was the duty of the municipality to remove the snow and ice which had accumulated upon the crosswalks.

It is a trite saying that municipalities are not insurers of the safety of travelers on the highway, and are not bound to anticipate every emergency, but that they are only required to exercise ordinary care, and use ordinary diligence in whatever situation they may be placed; and yet it seems necessary to reiterate this doctrine in order to prevent the extension of precedent for submission of cases of this kind to the jury. Applying this rule to this defendant, it cannot be said that it was negligent in not keeping the surface of the crosswalk exposed, nor was it negligent in not keeping a perfectly smooth walk for pedestrians. It was bound to keep the street in a

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reasonably safe condition for the passage of both teams and pedestrians. And while the question of negligence was submitted in general terms, and with the charge that only reasonable care was to be exercised, yet we think the proof shows that a finding that there was negligence on the part of the defendant in the care of this highway was against the weight of evidence and unwarranted by the testimony.

If a recovery can be sustained under the testimony in this case, a village has but small hope of escaping responsibility for injury to any one who may happen to slip upon one of its crosswalks in the winter.

Sidewalks and crosswalks are liable to become dangerous in the winter, but such dangers are apparent to all, and as stated in *Harrington v. City of Buffalo (supra)*, "Accidents occurring from such causes are chargeable solely to the persons injured, unless it can be shown that the cause thereof has been occasioned, aggravated or negligently permitted by the act of some third party charged with the duty of obviating or removing it."

In this case the accident occurred about three o'clock in the afternoon, the person injured having full knowledge of the condition of the street, and yet the only explanation of the accident is that "the two feet were taken right out from under me."

We think it was incumbent upon the plaintiff to bring herself within the rule above quoted, and the evidence fails to do this.

There were some exceptions taken upon the trial which we deem well taken, but, for the reasons above stated, the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

All concurred, except WILLIAMS, J., who dissented.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law and of fact.

BERNARD MULHERAN, Respondent, *v. JOHN GEBHARDT*, Appellant,
Impleaded with **CHARLES LISTMAN** and Others.

Corporation — action by a stockholder thereof to compel persons to account for property of the corporation which they had converted — a director of the corporation, who took no part in the conversion, is not a proper party.

Where a stockholder of a corporation brings an action in the right of the corporation, the directors thereof having refused to bring it, to compel certain of the individual defendants to account to the corporation, which is also made a party defendant, for property belonging to the corporation which they have converted to their own use, a director of the corporation, who was not one of the persons guilty of the conversion and who had no connection with the corporation until long after the consummation of the conversion, is not a proper party to the action and the complaint is demurrable as against him.

Directors of a corporation, as such, are not necessary parties to such an action.

APPEAL by the defendant, John Gebhardt, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Onondaga on the 13th day of July, 1903, upon the decision of the court, rendered after a trial at the Onondaga Special Term, overruling the said defendant's demur-
rer to the amended complaint. "

H. White, J. L. Cheney and C. E. Shinaman, for the appellant.

T. E. Hancock, J. W. Hogan and James Devine, for the respondent.

STOVER, J.:

The plaintiff alleges that certain defendants other than Gebhardt entered into a combination of persons engaged in the ice business; that these defendants acted as promoters of the stock; that options for various ice plants were procured by the defendant Bartels, and that on December 1, 1898, an agreement between the defendants other than Gebhardt was consummated and they became associated in the transaction; that all of the defendants continued to be associated together, except the defendant Sawmiller, a director of the company, who was succeeded in the office of director on or about March 12, 1900, by the defendant Gebhardt, and that prior to March 12, 1900, the defendant Gebhardt had no connection with

the transaction or the defendants named therein; that during the month of December, 1898, and after the agreement was entered into, a further agreement was entered into between the plaintiff and the defendants, other than Gebhardt, to sell to Bartels certain real estate and personal property in Onondaga county; that in pursuance of the agreement the various people engaged in the ice business delivered options to Bartels on or about January 31, 1899; that by virtue of said agreement the defendants, other than the defendant Gebhardt, were to act as the promoters of said company, and in the interest of all persons delivering options to Bartels; that a corporation was then organized and the property of the plaintiff and others obtained, plaintiff agreeing that he would not go into the ice business for a period of ten years; that plaintiff was to receive \$8,000 for his property under the agreement; that plaintiff received one-third of the value of his property in cash, one-third in preferred stock of the company, and the remaining one-third in the common stock of the company, in accordance with the agreement; that the company was capitalized at \$300,000, in 3,000 shares of \$100 each.

It was alleged that after the incorporation of the company 1,700 shares of the capital stock of the company were delivered to plaintiff and other subscribers in payment of two-thirds of the purchase price of the property transferred to said Bartels, but that said Bartels retained and held for himself "and the other defendants hereinbefore named," being the defendants other than Gebhardt, 1,300 shares of the capital stock of said company, and that said stock is still retained and held by said persons; that Bartels thereafter received deeds of the various properties, and that bonds were issued by the corporation. Plaintiff alleges that he was ignorant of the fact that all of the capital stock of the company was to be issued to the defendant Bartels, and was also ignorant of the fact that 1,300 shares of the capital stock were to be retained by said Bartels, and was also ignorant of the fact that instead of disposing of the said 1,300 shares of the capital stock of said company and using the proceeds thereof to pay one-third of the purchase price of the various pieces of property before mentioned as having been purchased by said company for one-third of the purchase price in cash, that said company would issue its bonds therefor;

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that said Bartels and the other defendants had fraudulently concealed such knowledge from the plaintiff, "and falsely and wrongfully, and with the intention to defraud and cheat the plaintiff, obtained the issue of the whole of said 3,000 shares of stock to the said Bartels in pretended payment for said properties as aforesaid;" that the said defendants Bartels, Listman and Shinaman have obtained for themselves, and at the expense of the plaintiff and other original stockholders, and without consideration, the amount of 1,300 shares of stock, which stock, or the proceeds thereof, the said Bartels, Listman and Shinaman, or their assigns, now retain and hold; that by reason of the control of said 1,300 shares of stock, the said Listman and other defendants named as directors and trustees of said People's Ice Company are in position to control, and do control, a majority of the stock of the defendant company, and have controlled and do now control the election of trustees and directors and all other officers; that plaintiff had demanded of the officers and directors of said corporation that an action be brought by said company to recover the proceeds of said 1,300 shares of stock issued without consideration and that it has been refused.

Plaintiff alleges that the corporation refused to bring the action against the defendants for the conversion of the stock, and, therefore, the corporation is made a party.

It will be seen that the only allegation against the defendant Gebhardt is that on March 12, 1900, he succeeded Ignatius Sawmiller as a director of said company, the allegation further being, in paragraph 7 of the complaint, "and prior to the said March 12th, 1900, the defendant John Gebhardt had no connection with said transaction or with the defendants above named therein as plaintiff is informed and believes."

There is no other allegation in the complaint in any way connecting Gebhardt with the transactions of the defendant.

Summarized, the complaint sets forth a cause of action against certain persons who, by reason of false representation, or illegal means of some kind, have obtained certificates of stock to the amount of \$130,000 which belonged to the corporation defendant.

The plaintiff, being a stockholder, had made his demand upon the directors to commence the action, and, upon their refusal, brings the action, making the corporation a defendant. The action, there

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fore, is one to enforce a right of the corporation, and the recovery, if any, must inure to the benefit of the corporation. The wrong done is to the corporation, namely, that \$130,000 of its stock, which should represent cash turned into its treasury, has been converted to the use of the individuals. But no cause of action is stated against Gebhardt. The fact that he is a director does not make him a necessary party to the action, for a director, as such, is not a necessary party. The corporation itself is a party, and no recovery could be had against the defendant Gebhardt. The complaint alleges nothing that he has done or neglected to do which would incur any legal responsibility on his part. The demand for judgment is that 1,300 shares of stock and the \$12,000 appropriated should be accounted for by the persons who obtained it and paid into the corporation to be distributed among the stockholders. So this action is not against the directors of the corporation to recover for a violation of their duties as directors, but an action to recover from certain persons who have converted the stock of the corporation, and of whom it is conceded Gebhardt is not one, and with whom he had no connection until long after the consummation of the alleged illegal scheme.

So without discussing the other questions upon the brief which concern the other defendants in the action, who, it is alleged, participated in the illegal scheme, no cause of action was alleged against the defendant Gebhardt. No recovery could be had as against him, under any view of the case, and his demurrer should have been sustained.

All concurred.

Interlocutory judgment reversed, with costs, and demurrer sustained, with costs, with leave to plead over upon payment of the costs of the demurrer and of this appeal.

EUGENE PATTAT, Respondent, *v.* JOHN J. PATTAT and Others, Respondents, Impleaded with JACOB PATTAT and Others, Appellants, and Others, Defendants.

Parol agreement by a person since deceased to will all his property to another — when it will be enforced — the agreement is void under the Statute of Frauds — when the rendition of services thereunder will not justify the court in decreeing specific performance — failure to plead the statute.

A parol agreement alleged to have been made by a decedent in his lifetime, whereby he agreed to will all his property to the other party to the agreement, will not be enforced unless the agreement possesses all the essentials of a contract, is fair and equitable and the terms thereof are definite and certain and are clearly established by the testimony of disinterested witnesses.

Such an agreement is void under the Statute of Frauds, and the rendition of services thereunder is not sufficient to take the case out of the statute and justify the court in decreeing specific performance, when it appears that the value of the services may be estimated and that it would consequently not be inequitable to refuse to decree specific performance.

Where the party with whom the alleged agreement was made sets it up as a valid contract in the answer interposed by him in an action brought to partition the real estate of which the decedent died seized and demands specific performance thereof, the other parties to the action, by neglecting to serve a reply to such answer, are not precluded from asserting that the contract was void under the Statute of Frauds.

APPEAL by the defendants, Jacob Pattat and others, from a judgment of the Supreme Court in favor of the plaintiff and certain of the defendants, entered in the office of the clerk of the county of Oswego on the 27th day of May, 1903, upon the report of a referee, and also (as stated in the notice of appeal) from an order entered in said clerk's office on the 27th day of May, 1903, confirming the report of the referee.

Willard A. Rill, for the appellants.

Irving G. Hubbs, for the respondent John J. Pattat.

STOVER, J.:

The action is for partition of real estate which is claimed by the parties as heirs of Joseph Pattat. The answer of defendant John J. Pattat sets up an agreement with Joseph Pattat in his lifetime by which Joseph agreed to will him all of his property if he,

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John J., would live with him, and carry on the farm of said Joseph until the death of Joseph; that he, John J., performed the agreement on his part, and that said Joseph did execute a paper which was not admitted to probate, and asks a decree of specific performance against the other defendants.

The issues thus raised were tried by a referee who found for the defendant John J. Pattat, and that he was entitled to all of the property which Joseph Pattat owned at the time of his death, and judgment was entered accordingly. The contract under which it is sought to take the entire property of Joseph Pattat rests entirely in parol and the witnesses by which it is said to be established are the father of John J., his mother and his aunt. The property described in the complaint consists of four (4) parcels of land. The testimony of the witnesses is not uniform as to the language used by Joseph at the time the alleged agreement was made. The father says that Joseph said that he would give him *this* property; the other says he said he would give him all he had, and the aunt says he said he would give him all he had, and nothing was said about a will. The agreement was alleged to have been made in September, 1898. Joseph Pattat died November, 1901.

In 1900 John J. married, and his father testifies that at that time John J. said he was going away and Joseph then told him he would give him a deed of the little red house (a house near Joseph's residence) if he, John J., would stay, and John J. said he would stay.

In the recent case of *Hamlin v. Stevens* (177 N. Y. 39) the court, speaking of a case similar to this, used this language: "Contracts of the character in question have become so frequent in recent years as to cause alarm, and the courts have grown conservative as to the nature of the evidence required to establish them. * * * Such contracts are easily fabricated and hard to disprove, because the sole contracting party on one side is always dead when the question arises." And again, "Such contracts are dangerous. They threaten the security of estates and throw doubt upon the power of a man to do what he wills with his own. The savings of a lifetime may be taken away from his heirs by the testimony of witnesses who speak under the strongest bias and the greatest temptation, with all the dangers which, as experience shows, surround such evidence. The truth may be in them, but it is against sound policy to accept

their statements as true under the circumstances and with the results pointed out. Such contracts should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. Unless they are established clearly by satisfactory proofs and are equitable, specific performance should not be decreed. We wish to be emphatic upon the subject, for we are impressed with the danger, and aim to protect the community from the spoliation of dead men's estates by proof of such contracts through parol evidence given by interested witnesses."

Claims of this character were formerly looked upon with disfavor, and the rule as above laid down, namely, that they must be clearly established by proof and must be equitable before a court of equity would enforce them, was rigidly adhered to, but it would seem that through an enlargement of precedents or a tendency to rely upon parol testimony the rule had been relaxed. The culmination, however, seems to have been reached in *Winne v. Winne* (166 N. Y. 263), in which a finding of fact based partially upon the idea that there were no children to be disinherited and no will to indicate what disposition the deceased intended was invoked to sustain a contract of this kind. But this case in the light of the later adjudications in *Mahaney v. Carr* (175 N. Y. 454) and *Hamlin v. Stevens*, above quoted from, can no longer be considered an authority. And the Court of Appeals in the *Winne* case limits its decision to the particular case, being bound by the finding of fact.

As said in *Mahaney v. Carr (supra)*, "Precedents in order to be of any value must be based upon some principle," and it will be found profitable to consider the context in this connection.

What, then, are the requisites in cases of this kind? The terms of the contract must be definite and certain; it must have the essentials of a contract, must be clearly established, and must be fair and equitable. Measured by these rules, we think the contract sought to be enforced must fail.

An examination of the entire evidence satisfies us that it is subject to nearly, if not quite all, of the objections urged in *Hamlin v. Stevens* and *Mahaney v. Carr (supra)*. It is not established by the clear, disinterested testimony requisite to warrant a court of equity to enforce it. There is much force in the contention that the contract

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is uncertain and lacks mutuality. The contract was void under the Statute of Frauds. (See Laws of 1896, chap. 547, § 207.) Part performance alone is not sufficient to take every case out of the statute. There must be such a condition that it would be inequitable to refuse specific performance; but when the rendition of services is the only performance relied on, it cannot be said that it is inequitable to refuse the decree since the value of the service can ordinarily be estimated. There must be some further consideration rendering it impossible to estimate fair compensation. Nor were the appellants precluded by the failure to set up the statute by reply. No reply was necessary, and the defendant by answer setting up his contract as a valid one was bound to defend it against any objection that might be made.

The judgment should be reversed in so far as it adjudicates that John J. Pattat was the owner of the portion of the real estate owned by Joseph Pattat in his lifetime, and adjudging that the said real estate was not disposed of by said Joseph in his lifetime, but descended to his legal heirs, and directing partition thereof to be made accordingly as the interests of such heirs may have been established.

All concurred, except Hiscock, J., not voting.

Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law and of fact.

MARY C. CAHILL, Suing as a Poor Person, Appellant, v. LENA SEITZ, Individually and as Administratrix, etc., of GOTTLIEB H. SEITZ, Deceased, and Others, Respondents.

Purchase of premises at a foreclosure sale by the guardian in socage of the infant owner—it is voidable by the infant—she need not wait until she has attained her majority to disaffirm it—Statute of Limitations—bona fide purchasers from the guardian in socage are protected—notice to such purchasers—facts appearing in the judgment roll in the foreclosure action—purchaser's duty as to the examination of title.

The purchase of mortgaged premises at the mortgage foreclosure sale, by the guardian in socage of the infant owner of the equity of redemption, is voidable by the infant, and it is not incumbent upon her to show actual fraud or injury.

The time for the commencement of an action by the infant to avoid the guardian's purchase is governed by section 388 of the Code of Civil Procedure, which provides that an action, the limitation of which is not specially prescribed, must be commenced within ten years after the cause of action accrues, and by section 396 of said Code, which provides that the time limited for the commencement of an action shall not be extended by any disability more than one year after such disability ceases.

In such a case the infant cannot effectually ratify the voidable purchase until she attains her majority, but she may, during her infancy, maintain an action to disaffirm the purchase. Consequently, for the purpose of applying the Statute of Limitations, the infant's cause of action will be deemed to accrue at the time the guardian in socage purchased the property and not at the time when the infant attained her majority.

The title of a person who purchases the premises from the guardian in socage, for value and without notice of the relations existing between his grantor and the infant, is superior to the infant's claims.

Such a purchaser is chargeable with knowledge of the facts appearing in the judgment roll in the foreclosure action, but recitals in the roll that the owner of the equity of redemption was an infant, and that her father and mother had died intestate, and that at the time the foreclosure action was pending she was living with her paternal uncle, who purchased at the foreclosure sale, and that she had no general or other guardian, do not impose upon the purchaser the duty of making inquiries to ascertain whether the purchaser at the foreclosure sale was the oldest and nearest relative of the infant, and, therefore, her guardian in socage by operation of law.

An intending purchaser of real estate will be presumed to have investigated the title; to have examined every deed or instrument forming a part of it, especially if recorded, and to have known every fact disclosed or to which an inquiry suggested by the record would have led. The duty incumbent upon him in this respect is to exercise the reasonable care and diligence of a good and faithful expert in the business of examining titles.

APPEAL by the plaintiff, *Mary C. Cahill*, suing as a poor person, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Erie on the 13th day of July, 1903, upon the decision of the court, rendered after a trial before the court without a jury at the Erie Trial Term, dismissing the plaintiff's complaint.

Yorke Allen, for the appellant.

George M. Browne, for the respondents, *Lena Seitz and others*.

Charles Diebold, Jr., for the respondents, *the Western Savings Bank of Buffalo and others*.

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HISCOCK, J.:

This action was brought to impress a trust upon certain premises in the city of Buffalo formerly owned by plaintiff and certain brothers and sisters. The action was founded upon the claim that while said persons, being infants, were the owners of said premises, the same were sold upon a foreclosure, and that upon such foreclosure the same were bid in in his own name and right by the defendant John Cahill, and that said Cahill in so doing acted in violation of the fiduciary relations which he then sustained to said infants as their guardian in socage.

Various defenses were urged and made the basis of the motion for a nonsuit, which was granted by the learned trial justice. There is nothing to indicate upon which of the grounds he based his decision but we think that the judgment appealed from must be affirmed upon the reasons, *first*, that plaintiff's cause of action was barred by the Statute of Limitations when she commenced her action, and *second*, that the defendants who now own or have liens upon the premises in question acquired the same as *bona fide* purchasers or incumbrancers for value without notice of any defect in the title. We shall discuss the questions involved in these two defenses in the order stated.

Plaintiff was born August 18, 1873. March 27, 1876, her mother, Ann Cahill, died intestate seized in fee of the premises in question. Besides her husband she left her surviving the plaintiff and three other infant children. The husband and two of the children, still being infants, died soon thereafter. The premises were subject to a mortgage for \$500, which was foreclosed, resulting in a sale of the property May 29, 1879, to the defendant John Cahill for \$685.72. It is said to have been worth at the time in the neighborhood of \$5,000 or \$6,000. Plaintiff at the time resided with said John Cahill, who was her uncle, and who we shall assume for the purposes of this discussion was her guardian in socage. The deed was promptly recorded, and between 1879 and 1887 Cahill was in possession of the property, collecting the rents thereof. In 1887 he sold the premises to the defendant Charles W. Seitz for a consideration now claimed to have been \$3,200. Seitz divided the tract into five parcels, and at various times thereafter and during the infancy of the plaintiff sold these parcels respectively to various persons, who

are defendants, and all of whom, with one exception, continued to hold at the time of the commencement of this action. Various mortgages upon these parcels, however, were executed after plaintiff ceased to be an infant to various defendants respectively, who still continue to hold the same.

When plaintiff was twelve years of age the property was pointed out to her and she was told that it was hers, and that her uncle, the defendant Cahill, was caring for it. When she was fourteen she knew and understood perfectly well that this property had been sold by her uncle, and that he had the proceeds which belonged to her. This she always knew and did not forget. When she was twenty-one years of age her uncle told her about the investment of the proceeds of the property, and that he had been having some trouble. When she was eighteen somebody in her behalf wrote for her share of the proceeds, and learned that her uncle had invested it in real estate in New York, which he thought the city would buy at some time for a large sum, but he did not know when.

Evidence was given of various acts of plaintiff from which it was urged that she had ratified and affirmed the conduct of her uncle in dealing with this property, and which we do not regard it necessary to discuss in view of our intention to dispose of the case upon other grounds.

Plaintiff became of age August 18, 1894. This action was commenced April 25, 1902. The purchase by Cahill occurred in 1879.

Upon the assumption that Cahill was a guardian in socage of plaintiff, it seems to be conceded that his act in purchasing the property of herself, her brothers and sisters upon the foreclosure sale in his own name was a violation of the obligations imposed upon him by such guardianship. We apprehend that there could be no reasonable question about this, for there existed in this case none of those facts which in the case of *Boyer v. East* (161 N. Y. 585) were held to make it proper for the guardian in socage to bid in in her own name the property belonging to her *cestui que trust*.

There seems also to be no question but that the limitations governing the commencement of this action are those found in section 388 of the Code, which, in substance, provides that an action the limitation of which is not specially prescribed must be commenced within ten years after the cause of action accrues. It is

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also plain and conceded that from May 29, 1879, to August 18, 1894, plaintiff was under the disability of infancy, and, therefore, entitled to the benefits of section 396 of the Code, providing, in substance, that the time of such disability is not a part of the time limited for commencing an action, "except that the time so limited cannot be extended more than five years by any such disability, except infancy, or in any case, more than one year after the disability ceases."

The disagreement between the parties arises over the question when plaintiff's cause of action accrued, it being claimed by the defendants that this took place when defendant Cahill bid in the property in 1879, and by the plaintiff that it did not take place until after plaintiff reached her majority. If the first contention is correct, there can be no doubt but that plaintiff had lost her rights before she commenced her action. The ordinary limitation of ten years would have expired in 1889, and by virtue of the exception in her favor on account of her infancy the limitation would have been extended for one year after she became of age or until August 18, 1895.

We think that the interpretation of the law urged by defendant to be applicable to the facts before us is the correct one.

The act of Cahill in purchasing the property was one of constructive as distinguished from actual fraud. It was voidable, as matter of law, because of the relations which existed between the purchaser and the plaintiff, and it was not necessary to its avoidance to show actual fraud or injury. Unless a rule is to be applied to plaintiff's cause of action different from that which would govern an analogous right of action in favor of an adult, there is no doubt that the cause of action accrued at the time of the sale and purchase by the guardian. (*Yeoman v. Townshend*, 74 Hun, 625; *Smith v. Hamilton*, 43 App. Div. 17; *Hecht v. Slaney*, 72 Cal. 363.)

It is urged by the learned counsel for the appellant that a different rule is so applicable. He says in substance that Cahill's act was subject to ratification or disaffirmance; that the operation of ratifying a voidable act presupposes a ratifier capable of making a binding election; that an infant is not capable of making a binding election, and, therefore, plaintiff's right of action to disaffirm her guardian's act could not accrue until she attained her

majority in 1894, and that, therefore, the statute commenced to run from that time. In support of his views he cites passages from opinions in various cases involving the right of a person to disaffirm and repudiate a conveyance made by him of real estate during infancy, to the effect that such a conveyance by an infant is valid until it is avoided by him after arriving at full age.

It may be conceded, of course, that a person may not until he reaches full age perform acts which will constitute an effective ratification of a voidable transaction occurring during infancy. It is a doctrine familiar and oftentimes expressed in a somewhat popular form that a person has a reasonable time after reaching majority in which to disaffirm or ratify acts performed during infancy. The more frequent and important application of this rule is sought in endeavors to demonstrate in various cases that because a former infant has not within a reasonable time after reaching full age disaffirmed an act he is, therefore, to be regarded as having affirmed and ratified it. While it is true that ratification of acts voidable as against an infant must be found in something done after majority, we do not believe that a converse principle applies which, in such a case as this, prevents a person while still an infant from disaffirming a voidable act performed by another against his rights and from seeking redress by action against the same.

The cases relied upon by counsel for the appellants as suggested, treat of the right of disaffirmance and avoidance of a conveyance of real estate executed by the former infant himself. Without going into a full discussion of the reason for the application of such rule to such cases it may be stated as a practical consideration that no harm could come from its enforcement. A deed executed by an infant would be vulnerable at any time even as against a purchaser for value, and there would be no difficulty in a recovery by the grantor of his property even if action was delayed until he became of age. This rule, however, postponing the right of disaffirmance by a former infant until majority, has not been extended to any such case as is now before us. In fact in the case of *Beardsley v. Hotchkiss* (96 N. Y. 201, 211) it is stated that a deed of land as well as a conveyance of personal property will be deemed to be ratified unless it is disaffirmed by the infant before he arrives at age or within a reasonable time thereafter.

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In cases affecting rights other than those involved in a conveyance by the infant himself it is well established that without waiting for majority an infant may disaffirm and seek redress against acts performed to his injury. (*Petrie v. Williams*, 68 Hun, 589, 595; *Sparman v. Keim*, 83 N. Y. 245; *Matter of Rogers*, 153 id. 316; *Eagan v. Scully*, 29 App. Div. 617.)

In the case last cited and upon an expression in which reliance is had by plaintiff's counsel for his argument upon this point, plaintiffs were allowed to recover in an action brought while they were still infants in disaffirmance of a conveyance executed by their ancestor while an infant.

The successful prosecution by infants of actions seeking to establish various kinds of rights is so familiar as not to require comment or discussion. We cannot believe that there is any legal or practical reason for holding that an infant must delay until reaching full age before disaffirming an act performed by a guardian against his rights, or that he must delay proceedings to secure his interest in the property which may be the subject of such an act until in all probability it shall have passed to others and beyond his reach.

We, therefore, hold upon this branch of the case that plaintiff's right of action accrued in 1879; that she was entitled to enforce it then, and that under the circumstances of this case the only benefit which she obtained under the exception in the Statute of Limitations was the extension of the year after 1894 in which to commence her action.

We come to the second defense, that the defendants at present owning the real estate are *bona fide* purchasers for value without notice and, therefore, protected against plaintiff's claim. If they are such *bona fide* purchasers or incumbrancers and without notice they are so protected. (*Harrington v. Erie Co. Savings Bank*, 101 N. Y. 262.)

The plaintiff's counsel admits this, but says that they are to be charged with knowledge of certain facts appearing in the judgment roll in the foreclosure action where Cahill bid off the property, and which facts were sufficient to charge them with knowledge of Cahill's guardianship in socage and, therefore, with the defective title which was being obtained.

In this discussion we shall agree with the counsel that said defend-

ants are to be charged with knowledge of the facts which did appear in said judgment roll, and we shall also agree with him as to the nature of those facts. They were that plaintiff was an infant and that her father and mother had died intestate; that at the time of the foreclosure action she was living with Cahill who was her paternal uncle, and that she had no general or other guardian. We feel constrained to differ with him, however, when we proceed further to his contention that these facts bound subsequent grantees at their peril to inquire and learn whether Cahill was the nearest and oldest of plaintiff's relatives, so that the law had cast upon him a guardianship in socage which made improper his purchase of the premises.

The rule claimed and to which we assent is that "an intending purchaser * * * must be presumed to investigate the title, to examine every deed or instrument forming a part of it, especially if recorded and to have known every fact disclosed or to which an inquiry suggested by the record, would have led." The requirement is for the exercise of a "reasonable care and diligence of a good and faithful expert" in the business of examining titles. (*Moot v. Business Men's Investment Assn.*, 157 N. Y. 208, 209.)

While the rule charging people with knowledge of the law includes principles which are complex, obscure and of infrequent application as well as those which are simple and familiar, we do not think it is out of the way in the consideration of what was a reasonable diligence in reference to this title to bear in mind that a guardianship in socage comes by operation of law rather than by express appointment; that it is of comparatively infrequent occurrence and seldom becomes an important element in the transmission of titles. An attorney of average experience and expertness in examining a title might very well fail to direct his mind to the possibility of such a guardianship. We see nothing in the facts disclosed by the judgment roll that Cahill was the uncle of and temporarily harboring plaintiff, who was an infant and an orphan, to suggest that he was her oldest and nearest relative and, therefore, her guardian by operation of law. It seems to us that the facts disclosed were entirely negative upon this subject. It might just as well be thought that he was the youngest as well as the oldest uncle. In fact, the evidence given by plaintiff herself upon the trial was not altogether too clear upon this point.

Neither do we think that there was anything in the purchase by Cahill of this property upon the sale which was reasonably calculated to excite inquiry and lead to information. The presumption is in favor of legal conduct and not in favor of violations of obligations. To our mind it was more natural for subsequent grantees to assume that Cahill in purchasing this property acted rightfully and with the intention, on account of his general relationship to plaintiff, to deal with and administer the property for her ultimate benefit, than it was for them to suspect that he was so purchasing in violation of his obligations as a guardian and to the final detriment and injury of the plaintiff.

In connection with the rules already adverted to we must keep in mind others construing and limiting the potency of facts appearing in a record to suggest to an intended purchaser the necessity of inquiring and seeking for other information which does not so appear in the record.

"If the facts within the knowledge of the purchaser are of such a nature as in reason to put him upon inquiry and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry as suggested by the facts, would have revealed." The question is not whether the defendant purchasers *could* have discovered the existence of the guardianship in socage by any inquiry, but it is whether, acting as ordinarily prudent persons would have done, they were called upon, under the circumstances, to make the inquiries. Were the circumstances such as to necessitate the making of some inquiry at the peril of being charged with the knowledge of some then unperceived fact? (*Anderson v. Blood*, 152 N. Y. 285.)

Within these principles we feel that there was not sufficient cause in the facts appearing in the judgment roll to reasonably excite upon the part of purchasers that suspicion and inquiry which might have led to ascertainment of the fact of Cahill's guardianship.

In accordance with these views we think that the judgment appealed from should be affirmed.

All concurred; WILLIAMS, J., in result only.

Judgment affirmed, with costs.

In the Matter of Proving the Instrument Propounded for Probate as and for the Last Will and Testament of HELEN A. RAYNER, Deceased.

WILLIAM B. DIMICK, Named as Executor, etc., of HELEN A. RAYNER, Deceased, Appellant; HENRY HARRISON WELLS, Respondent.

Surrogate — decree refusing to admit an alleged will to probate — the executor nominated therein may appeal.

A person nominated as executor in an instrument offered for probate as a last will and testament is a party aggrieved by a decree of the surrogate denying probate to such instrument, and is, therefore, entitled to appeal to the Appellate Division from such decree.

APPEAL by the petitioner, William B. Dimick, named as executor, etc., of Helen A. Rayner, deceased, from a decree of the Surrogate's Court of the county of Erie, entered in said Surrogate's Court on the 8th day of June, 1903, denying the petitioner's application for the probate of an instrument propounded as the last will and testament of Helen A. Rayner, deceased.

Ulysses S. Thomas, for the appellant.

John F. McGee, for the respondent.

SPRING, J.:

The appellant is the executor named in the instrument rejected. He is, therefore, a party aggrieved, and consequently possesses sufficient interest to enable him to appeal. (Code Civ. Proc. §§ 1294, 2568; *Matter of Stapleton*, 71 App. Div. 1.)

The contestant was a beneficiary in a previous will executed by the testatrix about two weeks before the instrument propounded. It was stipulated upon the hearing before the surrogate that this will was destroyed. If purposely destroyed by the testatrix, and she was competent at the time of its destruction, the respondent has no standing in court, for his sole interest and right to attack the will in controversy depend upon the validity and existence of the antecedent will. If it should appear upon a new trial that this

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interest had been obliterated, the respondent ought not to be permitted to continue this contest.

The attesting witnesses and Mr. Chapin, the draftsman who prepared the will, show that the requirements pertaining to the execution of wills were complied with and that the testatrix at the time of its execution was competent to dispose of her property by will and was free from any restraint. The testimony of Dr. York, her attending physician, does not seriously impugn her testamentary capacity. At least there is sufficient doubt as to the correctness of the conclusion reached by the learned surrogate so that we deem it proper to direct a trial by jury of the material questions of fact involved. (Code Civ. Proc. § 2588.)

The decree of the Surrogate's Court is, therefore, reversed, with costs to the appellant to abide the event and to be paid out of the estate of the decedent, and a new trial ordered at a Trial Term of the Supreme Court of the county of Erie.

The questions of fact to be submitted to and disposed of by the jury and the form of the order to be settled by and before Mr. Justice SPRING on two days' notice.

All concurred.

Decree of Surrogate's Court reversed, with costs to the appellant to abide event, to be paid out of the estate of said decedent, and new trial ordered at a Trial Term of the Supreme Court in the county of Erie. The form of the order to be settled by and before Mr. Justice SPRING on two days' notice.

**GEORGE ELSEY, Respondent, v. INTERNATIONAL RAILWAY COMPANY,
Appellant.**

Writ of inquiry issued in an action to recover damages for personal injuries—the court may, in its discretion, direct that it be executed before a judge and a jury drawn from the regular panel.

Where, upon a default by the defendant in an action to recover damages for personal injuries sustained by the plaintiff, a writ of inquiry is issued to the sheriff of the county to assess the plaintiff's damages, the manner in which the writ shall be executed rests in the discretion of the court.

If troublesome questions of law are likely to arise, the court may direct that the sheriff attend at the courthouse on a specified day; that the writ be executed in open court, the judge presiding, and that the jury to ascertain the damages be drawn from the panel of jurors then in attendance at a regular Trial Term of the court.

The court is not obliged to direct that the writ of inquiry be executed by the sheriff as the presiding officer and by a jury chosen by him.

WILLIAMS, J., dissented.

APPEAL by the defendant, the International Railway Company, from an order of the County Court of Niagara county, entered in the office of the clerk of the county of Niagara on the 23d day of December, 1903, directing the assessment of damages in open court by a jury to be drawn from the regular panel of jurors.

Frederick Chormann, for the appellant.

George D. Judson, for the respondent.

SPRING, J.:

The plaintiff sued the defendant in County Court in negligence to recover for personal injuries sustained by him. The defendant appeared in the action, but did not answer. Default having been made, the plaintiff applied upon notice for judgment pursuant to section 1214 of the Code of Civil Procedure. The court entertained the application and ordered that a writ of inquiry issue directed to the sheriff of the county to ascertain the damages of the plaintiff in the action; that the sheriff attend at the courthouse on a day specified; that the writ be executed in open court, the judge presiding, and that the jury to ascertain the damages be drawn from the panel of jurors then in attendance at a regular Trial Term of the court.

The appellant claims that the order is unauthorized, as the writ of inquiry must be executed by the sheriff as the presiding officer and by a jury chosen by him.

The practice for the ascertainment of damages on default where application to the court is essential is provided for in section 1215 of the Code of Civil Procedure. The court, in granting the application, may make the assessment itself or with the aid of a jury, or by a reference or a writ of inquiry, "except that where the action is brought to recover damages for a personal injury, or an injury to property, the damages must be ascertained by means of a writ of

inquiry." The section further provides that if a writ of inquiry is directed "the court * * * may direct that the * * * inquisition be returned to the court, or a judge or justice thereof, for its, or their, further action," or the direction may be omitted and the final judgment be entered by the clerk on the inquisition.

It is apparent, therefore, that the manner of the ascertainment of the damages on default, where application to the court is necessary, is largely left to the discretion of the court, except that in an action for a personal injury or an injury to property it must be by writ of inquiry. This practice in its essential features was contained in the Code of Procedure (§ 246, subd. 2) as amended in 1851 (Chap. 479). The Code of Civil Procedure does not prescribe the mode of executing the writ of inquiry, and the practice relative to it does not seem to have met with much consideration from the courts, especially in recent years.

A writ of inquiry is directed to the sheriff "because it is unknown what damages the plaintiff hath sustained," commanding the sheriff to inquire into such damages by a jury impaneled therefor, and to return the inquisition to the court. (2 Rumsey Pr. [2d ed.] 722; Black Law Dict. 627; 2 Burrill Law Dict. [2d ed.] 81; 10 Ency. Pl. & Pr. 1135.)

A few significant features may be noted. It is to be observed that the object of the writ of inquiry is primarily to aid the court in the assessment of damages. The writ is issued by it, or by a judge or justice thereof, and it may direct the inquisition to be returned to it evidently for its consideration. It is like the practice in an equity action to submit specific questions to the jury, but which are ultimately to be passed upon by the court with the enlightenment coming from the verdict. The writ is issued by the court and it appoints the sheriff as its representative or *alter ego* to execute its mandate and to preside if the judge does not act himself. The essence of the proceeding is that a jury is to assess the damages, but in what precise manner or how they are to be impaneled is not defined. It is "in the nature of an inquest of office to inform the conscience of the court" (10 Ency. Pl. & Pr. 1135.)

The execution of the writ may, however, be had in court before a jury drawn from the regular panel and with the judge presiding instead of the sheriff. (*Ellsworth v. Thompson*, 13 Wend. 658;

Peck v. Corning, 2 How. Pr. 84; *O'Donnell v. Hecker*, 3 How. Pr. [N. S.] 384; *Bossout v. Rome, W. & O. R. R. Co.*, 131 N. Y. 37, 40; 2 Rumsey Pr. [2d ed.] 723; 10 Ency. Pl. & Pr. 1137, and cases cited.)

The sheriff acts ministerially in the execution of this writ and in behalf of the court, and the inquisition may, if the court so elects, be returned to it for its consideration. The assessment of damages may occasionally involve intricate questions of law, and the court may deem it wise and prudent to retain the execution of the writ in court, and as the simpler method of drawing a jury is from the regular panel in attendance, that course may be adopted. This solution does not imply any departure from the substance of the writ, which is the ascertainment of damages by a jury with a view to the speedy disposition of the action.

It is suggested that inasmuch as the Code of Civil Procedure (§ 1215) vests the court with authority to direct the return of the inquisition to it, the conclusion follows that the execution of the writ must be had by a jury selected by the sheriff and the inquiry must be before him presiding.

This deduction does not necessarily follow. If the inquisition is not to be executed in court that direction may be made. In fact, the existence of this authority emphasizes the suggestion that the court or judge retains the control of the proceeding, and the inquisition is merely the means to aid in the final disposition of the subject-matter committed to the jury, which is the ascertainment of damages on default.

It would seem to be the more wholesome rule to leave the manner of executing the writ within the lines suggested to the discretion of the court. In cases easy of solution the sheriff with his jury may be safely trusted with their determination.

In a case where troublesome questions of law are likely to arise, the court, in the exercise of its judgment, should be permitted to conduct the inquiry itself with jurors taken from the regular panel.

Actions for personal injuries are numerous and are not decreasing. Often there is no defense to the action, but the parties are unable to agree upon the sum with which the defendant is to be charged. If each side can be assured that the inquiry to ascertain the damages may be heard in court if it so directs, the expense and delay of

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a trial may occasionally be avoided. Upon the present application affidavits were presented to the court and sufficient appeared to warrant the court in exercising its discretion in the manner it did.

Our conclusion is that the order should be affirmed, with ten dollars costs and disbursements.

All concurred, except WILLIAMS, J., who dissented.

Order affirmed, with ten dollars costs and disbursements.

LAMONT M. BABCOCK and Others, Appellants, v. SAMUEL J. CLARK,
Respondent.

Ejectment — the plaintiff in ejectment may show that a deed under which the defendant claims title is fraudulent and void although he did not plead its invalidity.

Where the defendant in an action of ejectment produces a deed concededly executed by the person through whom the plaintiff claims title, which deed, upon its face, is properly executed and conveys the premises in dispute, it is competent for the plaintiff to show that the deed is void because it was procured through fraud or undue influence, or because the grantor was mentally incapable at the time the instrument was executed, notwithstanding that he did not allege the invalidity of the conveyance in his complaint or in a reply to the defendant's answer.

APPEAL by the plaintiffs, Lamont M. Babcock and others, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Jefferson on the 11th day of May, 1903, upon the verdict of a jury, rendered by direction of the court after a trial at the Jefferson Trial Term, dismissing the complaint upon the merits.

The action is in ejectment, and was commenced on the 6th day of February, 1902, to recover possession of certain premises situate in the city of Watertown, N. Y.

George S. McCartin and John N. Carlisle, for the appellants.

William A. Nims, for the respondent.

McLENNAN, P. J.:

It was alleged in the complaint that one Martha Tisdale died at the city of Watertown, N. Y., on the 27th day of December, 1901;

that at and before her death she was the owner in fee of the real property in question ; that she died intestate, leaving her surviving the plaintiffs, among others, her heirs at law, and that as such they became and were the owners in fee and entitled to the immediate possession of their respective shares in said real estate ; that the defendant unlawfully entered into and continued in possession of the premises, without right or title thereto, and refused to surrender possession of the same after demand duly made. The defendant by his answer denied the plaintiffs' right to possession ; admitted his own possession and alleged that he was the owner of the real estate in question and entitled to its occupancy, under and by virtue of a deed of conveyance executed and delivered by Martha Tisdale, plaintiffs' intestate, to him on the 17th day of December, 1901, ten days before her death. The plaintiffs proved the title and possession of Martha Tisdale prior to her death ; that she died intestate ; that they were some of her heirs at law ; that the defendant was in possession of the premises, refused to surrender the same after demand duly made, and plaintiffs then rested. The defendant then introduced in evidence the conveyance from Martha Tisdale ; proved, in effect, that such conveyance was executed and delivered by her to him, and that he went into possession under the same, and then rested. The plaintiffs then offered to show that the execution and delivery of such deed by Martha Tisdale was procured by the defendant through fraud and undue influence ; that it was executed by her when *non compos mentis*, and for those reasons was absolutely void.

The learned trial court permitted some evidence to be given upon those issues, but finally held and determined that such evidence was incompetent in this action, for the purpose of impeaching the validity of defendant's title, and then directed a verdict in favor of the defendant. The court, in effect, decided that in an action of ejectment, where the defendant produces a deed concededly executed by a plaintiff, or by one through whom he claims title, which upon its face conveys the premises in dispute, and which upon its face is properly executed, it is not competent for the plaintiff to show that it is void because procured through fraud, by undue influence, or by reason of the fact that the alleged grantor was mentally incapable of making or executing such instrument. The correctness of such ruling is presented by this appeal.

We think for the purposes of this action we should assume that the plaintiffs stand in precisely the same position as if the action had been brought by Martha Tisdale, their intestate, had she been living. As was said in *Hill v. Hill* (4 Barb. 419): "And where a party is estopped by deed, all persons claiming under or through him are equally bound by the estoppel." (*Jackson v. Parkhurst*, 9 Wend. 209.)

Neither do we think the state of the pleadings was such as to preclude the plaintiffs from showing that the deed relied upon by the defendant was void, in case such proof was competent in an action of this character. The plaintiffs were not called upon to allege the existence of a deed of the premises which the defendant claims to have, when they are in the attitude of saying the defendant has no deed. The allegation of the defendant that he has a valid conveyance of the property, executed and delivered by the plaintiffs' intestate, in no sense constitutes a counterclaim, and, therefore, section 514 of the Code of Civil Procedure did not require the plaintiffs to serve a reply. It may be the defendant could have compelled such reply under section 516 of the Code, but the plaintiffs were not bound to anticipate, when they commenced their action, that a deed alleged by them to be void would be set up as a defense to their cause of action.

The failure of the plaintiffs to allege in their complaint, or by way of reply, the alleged fraudulent or void character of the conveyance under which the defendant claims title would not alone prevent a recovery. (*Sullivan v. Traders' Insurance Co.*, 169 N. Y. 213; *O'Meara v. Brooklyn City R. R. Co.*, 16 App. Div. 204; *Wilcox v. American Telephone & Telegraph Co.*, 176 N. Y. 115.)

We then come to the important question in this case, namely, whether or not a plaintiff, in an action purely and simply in ejectment, may prove that a deed executed and delivered by him, and under which the defendant claims title, was obtained by fraud, and was, therefore, void. We think the authorities sustain the appellants' contention in this regard, and that the learned trial court committed error in refusing to receive evidence tending to show that the deed under which the defendant claims was obtained by him from Martha Tisdale, plaintiffs' intestate, by fraud and undue influence, and that she, said intestate, at the time of the execu-

tion and delivery of such conveyance, was *non compos mentis*, and in refusing to submit such question to the jury.

The decision in *Van Deusen v. Sweet* (51 N. Y. 378) would seem to be decisive. The head note is as follows: "A deed executed by one *non compos mentis* is absolutely void; and where a defendant in an action to recover the possession of real property claims under such a deed, the fact of the incapacity of the grantor may be shown by plaintiff to defeat such claim, although no fraud is alleged and such incapacity had not been legally or judicially determined at the time of or prior to the execution of the deed. Plaintiff is not obliged to resort to an equity action to set aside the deed. It seems it is also competent in such action to show that a deed is voidable, to defeat a claim thereunder."

The most recent decision upon the question to which our attention has been called is that in the case of *Wilcox v. American Telephone & Telegraph Co.* (*supra*). In that case, which was an action in ejectment to recover lands in the highway occupied by defendant's poles, the plaintiff proved title to the *locus in quo*, entry thereon by the defendant, and the erection of its poles. The defendant then put in evidence an instrument under seal, executed by the plaintiff, whereby the plaintiff, in consideration of one dollar, granted to the defendant the right to construct, operate and maintain its line over and along the plaintiff's property. The plaintiff admitted his signature to this instrument, but testified that he was induced to sign the same by an agent of the defendant who told him that he had trimmed one of the plaintiff's trees, and wished to pay him for it, and that the paper which he signed was simply a receipt for one dollar; that he, the plaintiff, did not read the paper; that he had not his spectacles with him, and relied solely upon the statement of defendant's agent as to the contents of the instrument. Upon that evidence the trial court directed a nonsuit, and the judgment entered thereon was affirmed by this court, Mr. Justice SPRING writing a dissenting opinion. (73 App. Div. 614.) The decision of this court was reversed by the Court of Appeals. It was held that the plaintiff was correct in his practice in not alleging in his complaint the fraudulent character of the instrument under which the defendant claimed, and in not serving a reply to the answer of the defendant in which such instrument was alleged as a defense.

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It was further said: "He (the plaintiff) was not obliged to appeal to a court of equity for relief against the deed, but when it was set up to defeat his claim he could avoid its effect by proof of the fraud by which it was obtained. (*Kirchner v. New Home Sewing Machine Co.*, 135 N. Y. 182.) Nor was he obliged to return the dollar paid to him on its execution. The plaintiff does not attempt to rescind a contract as induced by fraud; the charge by him relates, not to the contract, but to the instrument which purports to represent the contract. In such a case the return of the consideration is unnecessary."

In that case as in this the plaintiff insisted that the deed under which the defendant claimed was absolutely void by reason of the fraud which induced it. He did not seek to reform such instrument and turn it into a receipt for one dollar, which he claimed was the real transaction between him and the defendant, but he gave proof tending to show that the defendant had no deed, because of the fraud practiced in obtaining the paper, and, therefore, had no title to the premises; and such proof, as we have seen, the Court of Appeals held was proper to be given in a case of ejectment, for the purpose of defeating the defendant's alleged title.

Upon principle we fail to see how the case at bar can be distinguished from the *Wilcox* case. Here the plaintiffs do not seek the reformation of the deed executed and delivered to the defendant by their intestate, but they take the position that the instrument under which he claims title is absolutely void, because when executed and delivered to him the grantor was *non compos mentis*, and because the same was procured through fraud and undue influence.

The learned counsel for the respondent calls attention to the case of *Hall v. La France Fire Engine Co.* (158 N. Y. 570), and insists that that decision is decisive of this case. In that case the plaintiff had executed a deed which upon its face conveyed the fee of the premises to the defendant, and the defendant put in evidence such deed as a defense to the plaintiff's alleged action in ejectment. The plaintiff then sought to prove, while admitting the execution of the deed and that he intended to convey an interest in the premises thereby, that such interest was not correctly expressed in the instrument; that he did not intend to convey all his interest, but only to insure to the defendant the continued use of certain streets that had

been laid out upon the premises in question. In other words, in that case, in an action in ejectment, the plaintiff sought to have the deed which he had given reformed, and it was held that such issue could not be tried or such relief granted in an action in ejectment, but must be tried in a court of equity. At all events, it seems to us that the *Wilcox Case (supra)* is decisive of the case at bar.

It follows that the judgment appealed from should be reversed and a new trial granted, with costs to the appellants to abide event.

All concurred.

Judgment and order reversed and new trial ordered, with costs to the appellants to abide event, upon questions of law only, the facts having been examined and no error found therein.

SPENCER KELLOGG and SPENCER KELLOGG, JR., Plaintiffs, v.
GEORGE F. SOWERBY, as President of the WESTERN ELEVATING
ASSOCIATION, and Others, Defendants.

Conspiracy — refusal of railroad companies to handle grain from an independent elevator on the same terms as grain from elevators controlled by an elevator association — it is unlawful — the railroad company and the elevator association are liable to the owners of the independent elevator for the damages sustained by them.

All of the grain elevators located at the port of Buffalo having railroad connections are owned, some by railroad companies whose roads enter Buffalo and the others by individuals or corporations. The elevators owned or controlled by the railroad companies are located adjacent to their respective tracks, while most, if not all, of the other elevators are located upon, or connected with, the Buffalo Creek railroad. The Buffalo Creek railroad is simply a branch railroad designed to afford connection with the other railroads and it makes a uniform charge for each car delivered to such other railroads. All of the elevators are absolutely dependent upon such other railroad companies for the transshipment of their grain by rail.

In 1900 the owners of all the rail elevators at Buffalo, with the exception of the owner of the Kellogg elevator, formed a joint stock association known as the Western Elevating Association. The agreement for the organization of the association provided that the parties thereto should devote their respective elevators to the purposes of such association; that the association should elevate all grain consigned to any of the elevators in the combination for one-half a cent per bushel, which was less than the price authorized by law; that the net profits of the elevating should be distributed among the parties to the

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agreement in accordance with a schedule of percentages agreed upon, and that "In case of the failure to come into the Association of any elevator or elevators named in said schedule, then and in that case the percentage of net earnings allotted to such elevator or elevators shall be divided *pro rata* according to per cent shown, between the other elevators in the Association."

Simultaneously with its organization, the association entered into a contract with each of the railroad companies, which provided that the railroad company would pay to the association one-half a cent per bushel for all grain transported by it, independent of whether such grain was handled by the association elevators or by the Kellogg elevator. The railroad companies, in order to reimburse themselves for the one-half cent per bushel which they agreed to pay to the association elevators on grain handled by the Kellogg elevator, adopted the following plan: They added elevator charges of one-half a cent a bushel to the freight charges on all grain carried by them, and then paid over the elevator charge to the elevator association, and in case the owners of the Kellogg elevator insisted on receiving one-half a cent a bushel for elevating grain, then such grain was made to pay elevator charges of one cent a bushel. The result of these conditions was to deter shippers of grain from using the Kellogg elevator, and it appeared that this was the purpose intended by the elevator association and the railroad companies.

Held, that the act of the railroad companies in refusing to handle grain from the Kellogg elevator upon the same terms that they handled grain from the other elevators, although the Kellogg elevator was as conveniently situated as the other elevators, was unlawful, and that, as such refusal was the natural result of the contracts entered into between the elevator association and the railroad companies and the result contemplated by the parties when they entered into such contracts, the elevator association and the railroad companies were equally liable for the damages sustained by the owners of the Kellogg elevator in consequence of the unlawful discrimination;

That it was not important that the owners of the Kellogg elevator might have a right of action against the elevator association to recover the moneys which were paid to it by the railroad companies for the elevating of grain at the Kellogg elevator.

MOTION by the plaintiffs, Spencer Kellogg and another, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance upon the dismissal of the complaint by direction of the court after a trial at the Erie Trial Term.

The action was commenced on the 5th day of July, 1900, to recover damages sustained during the year 1900, because of acts of the defendants, claimed to be illegal, done under and pursuant to an alleged unlawful combination and a conspiracy on their part to deprive the plaintiffs of a reasonable opportunity to profitably oper-

ate a grain elevator owned by them, and to successfully compete in the handling of grain at the port of Buffalo with owners of other elevators similarly situated.

George L. Lewis and *Simon Fleischmann*, for the plaintiffs.

Spencer Clinton, for the defendant Western Elevating Association.

William L. Marcy, for the defendant Erie Railroad Company.

John G. Milburn, for the defendant Delaware, Lackawanna and Western Railroad Company.

Charles A. Pooley, for the defendant New York Central and Hudson River Railroad Company.

Martin Carey and *James McC. Mitchell*, for the defendant Lehigh Valley Railroad Company.

MCLENNAN, P. J.:

The evidence very conclusively establishes that the conditions under which the plaintiffs were compelled to operate their elevator, the Kellogg, during the year 1900, were less favorable for the successful conduct of such business than those which pertained to the other rail elevators, so called, at the port of Buffalo, although for all practical purposes the Kellogg was as conveniently located and equipped as any of the others; that thereby the plaintiffs were unable to earn as much as they would have done had such conditions been uniform. If such result was occasioned by the unlawful acts of the defendants, done pursuant to an illegal combination on their part, or because of an unlawful discrimination enforced against the plaintiffs, they are entitled to recover any damages thus occasioned, no matter under what form of agreement the defendants may have acted, or what method of procedure they adopted. What the plaintiffs or defendants may have done or omitted to do in previous years is unimportant, except as such acts or omissions may throw light upon the situation of the parties as it existed during the year 1900, or tend to explain the intent and purpose of the acts of the parties in the premises. This action relates solely to what occurred in the year 1900, the claim

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being that during that year the defendants unlawfully combined, and, acting in concert and with a common purpose, pursued such course of conduct towards the plaintiffs as to prevent them from successfully operating their elevator or doing business thereat, under as favorable conditions as the same was done at the other rail elevators located at the port of Buffalo which are in competition with the plaintiffs' elevator, and that as a result the plaintiffs sustained substantial damages.

Upon an appeal from an interlocutory judgment in this case, overruling a demurrer to the complaint, the judgment was affirmed, and this court unanimously decided that the complaint stated a cause of action. (*Kellogg v. Lehigh Valley R. R. Co.*, 61 App. Div. 35.) Therefore, upon this appeal it is only necessary to determine whether or not the plaintiffs introduced any evidence which fairly tended to establish the allegations of the complaint.

The defendant the Western Elevating Association was a joint stock association organized in the spring of 1900, "for a term beginning with April 23rd, 1900, and ending March 31st, 1901," by all the owners or representatives (about twenty in number), with the exception of the plaintiffs, of rail elevators, so called because connected with railroads, in the city of Buffalo, including the defendant railroad companies, "for the convenience of their business, and in order that they may render better service to the public." The elevators owned or controlled by the defendant railroad companies were located adjacent to their respective tracks; the others or most of them, including the Kellogg, plaintiffs' elevator, were located upon or connected with the Buffalo Creek railroad, which in turn was connected with each of the railroads of the defendant companies, and such road afforded the only railroad facilities available to such elevators. All were accessible to steamers or vessels from the lakes, and their cargoes of grain were discharged directly into such elevators, but they were all dependent upon the defendant companies for the transshipment of such grain by rail. No grain or other freight was delivered to the Buffalo Creek railroad except for transfer to connecting railroads; it had no cars or other necessary operating equipment, except engines, with which it conveyed cars from the other roads to shippers upon its line, and returned such cars to them when loaded. That was its only business, and

for such services it received one dollar and ten cents from any railroad for each car so received from and delivered to it, which was added to the freight charges on any shipment so made.

The situation of the plaintiffs in the spring of 1900 was that they owned the Kellogg elevator, with a capacity to elevate about 20,000,000 bushels of grain in a season, located on the Buffalo Creek railroad, precisely as were many of its competitors, accessible to the lake craft for the delivery of grain into it, but absolutely dependent upon the defendant companies for getting such grain out of it if it was to be shipped by rail.

In the early part of the year 1900 negotiations began between the owners or representatives of all rail elevators at the port of Buffalo, including the defendant railroad companies, looking to the formation of the defendant association. Its real purpose was to establish and maintain uniform elevator charges, and undoubtedly with that accomplished the business could be done with greater convenience to the railroad companies, more expeditiously and satisfactorily and with greater profit to the owners of elevators as a whole. The plan proposed was, in effect, to form an elevator pool or trust, by which the net receipts for elevating all grain coming into the port of Buffalo for delivery to any one of the rail elevators should be distributed according to a schedule of percentages to be agreed upon between the owners of all such elevators, such proceedings not depending entirely upon the amount of grain actually elevated by any elevator, but to some extent upon its estimated capacity, equipment, value, etc., so that in some cases an elevator might do little or no business during the year and yet receive a substantial percentage of the profits earned by the other elevators belonging to the association. Earnest and strenuous efforts were made by the other owners of rail elevators, including the defendant companies, to induce the plaintiffs to join such association and to accept a certain percentage of its net receipts. It was proposed that the elevating charges for a year should be one-half cent per bushel (less than the elevator charges authorized by law). The plaintiffs, apparently, were not averse to the proposed plan of doing business, but insisted that they should receive a larger percentage of the net receipts of the association than was offered, and demanded a bonus in addition, which demand was considered unfair and unreasonable by the own-

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ers of the other elevators. As a result of such negotiations the plaintiffs refused to become members of the association to be formed, and announced their intention of running the Kellogg elevator as an independent concern and in competition with the others.

For the purposes of this appeal we may assume that the proposed arrangement by the elevator owners, and the formation of the association to give effect to the same, was not illegal. It was, in effect, that all the owners of rail elevators at the port of Buffalo should devote their respective properties to the purposes of the association; that it should agree to properly elevate all grain consigned to any of such elevators, at a price less than they were authorized by law* to charge, to wit, one-half cent per bushel, and that the net profits of such elevating should be distributed among such elevator owners in accordance with a rate of percentages also agreed upon. If we assume that it was entirely competent for the owners of elevators in the city of Buffalo, any or all of them, to enter into such an agreement, it certainly was also within the rights of the plaintiffs to refuse to join such proposed association, or to accede to its suggested plan of operation in the premises. The plaintiffs had an absolute right to say, the Kellogg elevator, which is owned by us, we propose to run and operate as an independent concern, and will invoke the protection of all law to enable us to successfully operate it in competition with the other rail elevators at the port of Buffalo, whether members of any association or otherwise. Under these conditions the defendant association was formed, and, as we have seen, included all the persons and corporations owning or interested in rail elevators at the port of Buffalo, with the exception of the plaintiffs. The agreement forming the defendant association, among other things, provided: "In case of the failure to come into the Association of any elevator or elevators named in said schedule, then and in that case the percentage of net earnings allotted to such elevator or elevators shall be divided *pro rata* according to per cent shown, between the other elevators in the Association."

Simultaneously with the organization of such association a contract was entered into between it and each of the defendant railroad companies, which provided in substance that such railroad company

*See Laws of 1896, chap. 376, § 32.—[REP.]

would pay to the defendant association one-half cent per bushel for all grain transported by it which came into the port of Buffalo directed to any rail elevator, and independent of whether such grain was handled by the association elevators or by those not belonging to or controlled by it. In other words, by such agreements the defendant companies agreed to pay elevator charges of one-half cent per bushel to the defendant association for all grain elevated in the rail elevators of the city of Buffalo and carried by such railroad companies, whether such grain was elevated by the association elevators, by the plaintiffs, or the elevators of other parties in no manner connected with such association. Such contracts were made by the defendant companies separately, but in form and substance were substantially alike. In short, the defendant companies, not as elevator owners, but as common carriers, agreed to pay to the defendant association, composed of elevators which were in competition with the plaintiffs' elevator, one-half a cent a bushel for all grain elevated by the plaintiffs' elevator, with which the defendant association had nothing to do, and had expended no labor and incurred no expense in connection therewith.

We may assume that the plaintiffs are not entitled to complain because of the organization of the defendant association, or on account of the contracts entered into between it and the defendant companies, provided the acts of the defendants, done under or in pursuance thereof, were not such as to unjustly prejudice the plaintiffs' legal rights in the premises, among which was the right to operate their elevator upon equal terms with their competitors, its location, equipment, management and all other conditions being as favorable for the transaction of its business, and the right to have grain which was elevated by it carried to its destination by any of the defendant companies upon the same terms as grain handled by the competing elevators was carried.

When the defendants commenced operations under the contracts referred to precisely what was to be expected happened. The natural and logical result followed, to wit, the defendant companies sought to reimburse themselves for the one-half cent a bushel which they agreed to pay to the defendant association on grain carried by them, even if elevated by the Kellogg elevator, and which such association had in no manner earned.

That was accomplished by compelling the plaintiffs, in effect, to pay to such companies one-half cent a bushel as elevator charges for all grain delivered to them for transportation by the Kellogg elevator, the result of which was to make all grain which passed through the Kellogg elevator pay a charge of one cent a bushel in case the owners of the Kellogg elevator received one-half a cent a bushel for elevator charges, the amount received by all the other rail elevators at the port of Buffalo. The precise method adopted to accomplish such result was very simple, and at the same time most effective. Elevator charges of one-half cent a bushel were added to the freight charges upon all grain carried by the defendant companies, and which was delivered to them through the rail elevators, including the Kellogg. Such elevator charges were collected by the railroad companies from the consignees of such grain and paid over to the defendant association, to be afterwards distributed among its members, no part of which, however, would go to the plaintiffs, notwithstanding the fact that a considerable portion of such grain had been elevated by them. In case the plaintiffs insisted that they should receive one-half cent a bushel for elevating such grain, the same as the owners of the other rail elevators received, then such grain was made to pay one cent a bushel for elevator charges.

The evidence clearly establishes that under the agreements entered into between the defendants, and the method adopted for carrying out such agreements, the result was that if the plaintiffs received one-half cent a bushel for grain elevated by them in the Kellogg elevator, such grain, if carried by the defendant companies, was obliged to pay one cent a bushel as elevator charges, whereas, there was a charge of only one-half a cent per bushel for all grain passing through the other rail elevators at the port of Buffalo during the year 1900. The evidence also very clearly shows that because of such conditions shippers of grain were deterred from using the Kellogg elevator in the spring of 1900; in fact, no other result could be expected than that the Kellogg elevator would be substantially put out of business. Shippers of grain would not pay one cent a bushel elevator charges, for the sake of sending their grain to the Kellogg elevator, when they could obtain equally as good elevator service for one-half a cent a bushel through its competitors.

It is not seriously contended in the exhaustive briefs presented by

the able counsel for the respective defendants that the conditions which prevailed in respect to the Kellogg elevator, in the spring of 1900, were not such as to prevent it from successfully competing with the other rail elevators similarly situated at the port of Buffalo. The situation as it existed was injurious to the plaintiffs, tended to destroy their business and render their property unproductive. The evidence tends to show that such result was brought about by a combination, by the concerted action of all the defendants, and that such was their intent and purpose in entering into the agreements, and in doing the acts referred to. The negotiations leading up to the organization of the defendant association, the agreements executed by each of the defendant companies, and their acts thereunder, all tend to prove that it was the intent and purpose of the defendants to compel the plaintiffs to cease operating the Kellogg elevator in competition with the others, or to run it at a loss.

An examination of the whole evidence leads us to the conclusion that it tends to prove that the defendant railroad companies combined and conspired with the defendant association, a competitor of the Kellogg elevator, to injure the plaintiffs' business, and to prevent competition in elevating grain at the port of Buffalo during the season of 1900, and that for the purpose of carrying out such conspiracy the association was organized and the contracts referred to were made; that in pursuance thereof the defendant companies refused to carry grain from the Kellogg elevator upon as favorable terms as from its competitors, and that, in consequence of such agreements and the acts done thereunder, the plaintiffs sustained substantial damage.

If we have correctly interpreted the evidence it cannot be doubted that the plaintiffs are entitled to recover the damages thus occasioned. It is unimportant that the organization of the defendant association, and the agreement between its members as elevator owners was not illegal; that the full performance of all its provisions would not have afforded the plaintiffs legal ground for complaint, even if they sustained damage thereby. Unquestionably, any number of elevator owners have the right to adopt a plan of co-operation, to protect their common interests, and to prevent a hostile and unprofitable competition for business between themselves, and to that end may agree to place their earnings in a com-

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mon pool, and to divide them *pro rata* upon the basis of agreed percentages. (*Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25, 37.) Certainly if by such arrangement elevating charges were not unduly increased, and proper and adequate facilities were afforded to the public, it was not unlawful and in no manner infringed upon the legal rights of the owner or owners of other elevators.

In this case the plaintiffs do not complain because of the agreement entered into between the owners of elevators, as such, members of the defendant association, but because such agreement was one of the instruments which was employed in conjunction with the contracts executed by the several defendant companies to destroy the plaintiffs' business, and because of the acts done by all of the defendants acting in concert, and with the common purpose of bringing about such result. The contracts which made the plan effective were those executed by the defendant companies as common carriers, and not as owners of elevators, and, as we have seen, the evidence tends to show that the defendant association was organized for the purpose of enabling such contracts to be made by the defendant common carriers. Such companies could not protect their interests as elevator owners by entering into contracts as common carriers, which, as such, they were by law prohibited from making.

It must, therefore, be determined whether or not the purpose of the defendants, and the means employed by them to prevent the Kellogg elevator from doing business under as favorable conditions as its competitor (the defendant association) were unlawful, for if not the plaintiffs cannot complain, no matter how serious the consequences to them.

At the foundation of every *tort* must lie some violation of a legal duty, and, therefore, some unlawful act or omission. Whatever or however numerous or formidable may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended or the means by which it was to be accomplished are shown to be unlawful. (*Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382, 394.)

Was the defendants' purpose respecting the business of the Kel-

logg elevator, and the means employed to carry the same into effect, unlawful? The evidence tends to show that the purpose was to destroy the business, and that the means employed was to compel grain transported from it to pay one cent a bushel elevator charges, in case the plaintiffs received the same compensation for elevating as did the owners of all other rail elevators at the port of Buffalo similarly situated. Result, purpose carried out, and plaintiffs' business substantially destroyed. What the defendants did or might have done simply as elevator owners may be eliminated from consideration. Was what the defendant companies did as common carriers, acting under and in pursuance of the contracts made by them separately with the defendant association, unlawful? That it effected a substantial discrimination against the plaintiffs and in favor of the defendant association, its competitor, is plain.

We think it was unlawful for the defendant companies to refuse to carry grain from the plaintiffs' elevator upon the same terms as it carried grain from the elevators of the defendant association.

Vincent v. C. & A. R. R. Co. (49 Ill. 33) was an action brought to restrain the defendant from refusing to deliver cars to plaintiffs' elevator upon the same terms as it delivered cars to other elevators similarly situated. It was held that the plaintiffs were entitled to an injunction. The court said: “* * * It need only be said that a railway company, although permitted to establish its rates of transportation, must do so without injurious discrimination as to individuals. It must deal fairly by the public, and this it would not be doing if allowed so to discriminate as to build up the business of one person to the injury of another in the same trade.” (*Chicago & North Western Railway Co. v. People ex rel. Hempstead*, 56 Ill. 365.)

In the case of *Coe v. Louisville & Nashville R. R. Co.* (3 Fed. Rep. 775) the whole question is discussed by Circuit Judge BAXTER in a very exhaustive opinion, and the conclusion is reached that it is not permissible for a common carrier to discriminate in the handling of freight of the same character offered by two individuals, and similarly situated. The *Vincent Case (supra)* is cited with approval, and in the course of the opinion it is said: “Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is

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the legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. * * * By an unjust exercise of such a power they could destroy the business of one man and build up that of another, punish an enemy and reward a friend. * * *

We conclude that the acts of the defendant companies in refusing to handle grain from the Kellogg elevator upon the same terms that they handled grain from the other elevators was unlawful, and such refusal being the natural result, and that contemplated by the defendant association when it entered into the contracts referred to with said companies, the defendant association became a party to such unlawful acts, and equally liable with the other defendants therefor.

It is not important that the plaintiffs may have had a right of action against the defendant association for any moneys paid to it by the railroad companies, and received by them for the elevation of grain by the plaintiffs at the Kellogg elevator. Under the plan adopted by the defendants the elevator charges were collected by the railroad companies, and such charges belonged and should be paid to the owners of the elevators through which the grain passed, unless such owners otherwise agreed, and, therefore, payment to any one else was improper and can be recovered from those making it. Neither is it important that the plaintiffs' elevator was located upon the Buffalo Creek railroad, and that the grain was delivered to the defendant companies by means of that road. As we have seen, it was simply a branch road or a switch, accessible to all the railroads, and existed solely for the purpose of delivering freight to them from shippers located upon its line, the charge for such service being uniform. The defendants, under the circumstances, were not at liberty to discriminate against the plaintiffs because of those conditions. Undoubtedly, they might have refused to send their cars over said road for the convenience of any shipper, but having adopted the plan or doing so they had no right to make an exception as against the plaintiffs. (*Wight v. United States*, 167 U. S 512.)

It follows that the plaintiffs are entitled to recover in this action

the damages sustained by them up to the time of its commencement, in case the facts are found in favor of the plaintiffs.

The plaintiffs' exceptions should be sustained and the motion for a new trial granted, with costs to the plaintiffs to abide event.

All concurred; Hiscock, J., not sitting.

Plaintiffs' exceptions sustained and motion for new trial granted, with costs to the plaintiffs to abide event.

GEORGE SNELL, Respondent, *v.* WILLIAM CORNWELL, Appellant.

Injury to a horse while in the possession of a bailee for hire—the bailee must show that it was not the result of negligence on his part.

Where a horse dies as the result of an injury received by it while in the possession of a bailee for hire, the bailee must, in order to defeat an action brought against him by the owner of the horse to recover its value, prove that the injury which the horse sustained was not the result of negligence or of want of reasonable care on his part.

APPEAL by the defendant, William Cornwell, from a judgment of the County Court of Jefferson county in favor of the plaintiff, entered in the office of the clerk of the county of Jefferson on the 17th day of December, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 9th day of December, 1903, denying the defendant's motion for a new trial made upon the minutes.

Lewis H. Ford, for the appellant.

John O'Leary, for the respondent.

SPRING, J.:

This action was commenced in Justice's Court. The plaintiff recovered a verdict, which was substantially a victory for the defendant, and an appeal was taken to the County Court and a new trial had. The plaintiff was the owner of a horse and hired it out to the defendant to work on the latter's farm for a period of two weeks at fifty cents a day. The horse was not returned and the plaintiff sued for its value and for the stipulated price. The substantial

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allegations of the complaint were admitted by the answer. Upon the trial in County Court the defendant's attorney sought to make the plaintiff elect whether his action was based on negligence or on the contract of hiring. The county judge quite insistently urged that the complaint should be amended by inserting a cause of action in negligence. The plaintiff's counsel, appreciating that he already stated a cause of action, was adverse to complying with the request of the court, and it is somewhat uncertain from the record whether the amendment was made, but there was no election required of the plaintiff.

The suggested amendment was entirely unnecessary, and the case was properly tried on the part of the plaintiff in accordance with the complaint in the Justice's Court. The defendant was a bailee of the plaintiff for hire and it was incumbent upon him to return the horse to the plaintiff at the expiration of the stipulated time of service. It appears that the horse died by reason of an injury received while the defendant was using it. If this injury was not the result of negligence or the want of reasonable care by the defendant, then it was incumbent upon the latter to establish this fact. Primarily he was charged with the duty of returning the horse, and he must show excuse for not doing so, and that burden was not upon the plaintiff. As has been stated, the case was tried by the plaintiff upon this theory, and it was a fair question of fact and decided adversely to the defendant.

If either of the pleadings was defective it was that of the defendant in failing to allege that the horse was injured and died without his fault, but that question is immaterial, for the case was tried on the merits.

The judgment and order should be affirmed, with costs.

All concurred.

Judgment and order affirmed, with costs.

LYDIA L. POWELL, a Creditor of the UNITED STATES MUTUAL ACCIDENT ASSOCIATION OF THE CITY OF NEW YORK, Suing in Her Own Behalf and for All Others Similarly Situated, etc., Respondent, v. JAMES W. HINKLEY, Appellant, Impleaded with CHARLES B. PEET and Others.

Action by the holder of a certificate issued by an insurance association, on behalf of herself and parties similarly situated, to establish her claim, to compel the directors of the association to account for moneys which they had misappropriated, and to procure the removal of the receiver of the association and the appointment of a new receiver — when the complaint states but one cause of action.

The complaint in an action brought by a creditor of the United States Mutual Accident Association of the city of New York on her own behalf and on behalf of all others similarly situated, alleged that the association was indebted to her in the sum of \$10,000 upon a membership certificate issued by it; that certain defendants, who were directors of the association, had, in violation of the duties which they owed to the plaintiff and to others, wasted, misappropriated and converted to their own use the funds and property of the association which came into their hands as directors; that, by reason of such misconduct, the association became insolvent, and that the defendant Gray had been appointed receiver thereof.

The complaint further alleged that Gray, as such receiver, had been guilty of extravagance, negligence, inattention, inefficiency and disregard of his duties, and that he had refused to bring an action against the derelict directors; that his conduct had been such as to indicate that he was an improper person to bring such an action, even if he were willing to do so, and that there were many other persons and creditors in the same situation as the plaintiff who might be in a position to join with her in the prosecution of the action.

The plaintiff demanded judgment that the existence and amount of her claim be established; that the defendant directors be compelled to account for their conduct and misconduct and to pay over to a receiver whatever money the court should adjudge that they had misappropriated; that Gray should be removed from his position as receiver and some other proper person appointed in his place and that he might be held personally liable in certain contingencies.

Held, that the complaint did not state more than one cause of action.

That allegations of the complaint that the defendant directors owed certain duties to the holder of the membership certificate in the way of retaining and investing various moneys while superfluous, and an allegation that the defendant Gray had been guilty of extravagance, etc., and a prayer for relief asking that the defendant Gray be held personally liable in certain contingencies while seeking relief that would not be granted in this action, did not constitute, in either case, a separate cause of action.

MCLENNAN, P. J., and WILLIAMS, J., dissented.

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APPEAL by the defendant, James W. Hinkley, from an order of the Supreme Court, made at the Erie Special Term and entered in the office of the clerk of the county of Erie on the 15th day of October, 1903, denying said defendant's motion to compel the plaintiff to serve an amended complaint herein separately setting forth and numbering the statements of the facts which constitute the alleged causes of action against the defendants.

Carl Schurz Petrasch, for the appellant.

M. Fillmore Brown, for the respondent.

HISCOCK, J.:

This action was brought by plaintiff as the death beneficiary in a policy or certificate of membership issued by the United States Mutual Accident Association of New York city to one Frank L. Powell. Its main object may be generally stated to be that of compelling various defendants, including appellant, to account for their alleged misconduct and misappropriation of funds while acting as directors of said accident association, and of thereby securing redress and relief for plaintiff and other creditors of said association who are similarly situated.

Upon this appeal it is assumed by both counsel that the action is, and may be, instituted under sections 1781 and 1782 of the Code. The first section, amongst other things, provides for the maintenance of actions against trustees and directors of a corporation to compel them to account for their official conduct, and to pay to the corporation which they represent, or to its creditors, any money and the value of any property which they have acquired to themselves or lost or wasted by a violation of their duties. The second section provides that, outside of certain exceptions, such an action may be brought by a creditor of the corporation.

No argument can well be addressed to us upon this appeal by the learned counsel for the appellant questioning the right of plaintiff as a creditor to maintain this action, or the sufficiency and effectiveness of the allegations contained in her complaint to set forth at least one cause of action. This motion is based upon the theory, not that the complaint does not state a cause of action, but that upon the contrary, it goes to the opposite extreme, and in a single count states at least three causes of action. We, therefore, do not have

before us for present consideration any questions, if such in fact exist, which might arise upon a demurrer with reference to the sufficiency of plaintiff's complaint as stating in her behalf a cause of action.

In support of his motion, and in fact by the express terms of his notice, defendant claims that the complaint sets forth three causes of action, as follows:

1. An alleged cause of action at law upon a policy of insurance.
2. A cause of action against the defendant directors for misappropriating and diverting the profits of the accident association.
3. A cause of action for waste, neglect and misappropriation of the assets of said association after it became insolvent.

We do not agree with the appellant's contention in these respects.

For the purpose of this examination the allegations in plaintiff's complaint may be readily separated into four groups.

The first describe the organization of the accident association and the operation and conduct of its business as carrying on a system of mutual co-operative insurance, and the issue by it to Frank L. Powell of a certificate of membership whereby, under certain conditions, it became obligated to pay to plaintiff the sum of \$15,000 upon his death; that these conditions arose, and that plaintiff under said certificate became entitled to said sum, upon and on account of which she has only received \$5,000.

The second allege the relationship of appellant and various others of the defendants to said accident association as directors, and that in violation of the duties which they owed to this plaintiff and others, they, in various ways, wasted, misappropriated and employed to their own benefit the funds and property of the association which came into their hands and control as such directors; that by reason of such misconduct the association became insolvent, and the defendant Gray was appointed its receiver, and is still continuing to act as such.

The next group allege that said Gray as such receiver has been guilty of extravagance, negligence, inattention, inefficiency and disregard of his duties, and that, in addition to his refusal to bring an action against the alleged derelict directors upon the request of this plaintiff, his conduct has been such as to indicate that he is an improper person to bring it even if willing to do so.

The final allegations relate to the existence of many other persons and creditors similarly situated as plaintiff, and who may be in a position to join with her in the prosecution of this action.

Upon these allegations the plaintiff demands judgment, among other things, that the existence and amount of her claim be established; that the defendant directors be compelled to account for their conduct and misconduct, and to pay over to a receiver whatever money the court shall adjudge that they have misappropriated.

There are some other allegations in the complaint and some other clauses in the prayer for relief which we shall consider hereafter. Considering the allegations and the prayer for relief as stated by us we do not think that a reasonable construction leads to the conclusion that more than one cause of action is stated. It seems to us that the allegations of the complaint proceed in a perfectly orderly and logical manner from the statement of plaintiff's interest as a beneficiary and creditor under the certificate of insurance, through the alleged misconduct of the defendant directors and the relationship and conduct of the defendant Gray as receiver, up to a proper and legitimate demand for relief against the same. It is true that the existence of the defendant Gray as receiver, and his alleged misconduct as such, has brought into the complaint some allegations which would not ordinarily be found therein. But we think it was entirely reasonable and proper for the plaintiff to allege not only that Gray, as receiver, had refused to bring this action, but also that his conduct was such as to render him an improper person to be intrusted with the management of such litigation. Whether the court should find or not that these latter allegations were a sufficient reason for the institution of this action by plaintiff instead of by Gray as receiver, they were certainly proper allegations in connection with the main cause of action to address to the court as a reason why the action was brought as it was. We think further that such allegations were proper as leading up to an additional clause contained in the prayer for relief to which we now refer, viz.: The demand that Gray be removed as receiver and that some proper person be appointed in his place. This again is an incident of relief which would not ordinarily be necessary. But in this case, if plaintiff should succeed in her claim, it would be necessary that the judgment as requested should compel the defend-

ants to pay over moneys to the association, or the receiver acting in its behalf, and if plaintiff should be able to establish that the defendant Gray was an improper and unsafe person to receive from such directors, in behalf of said corporation, such funds, it would be entirely within the province of a court of equity to remove him and appoint somebody who would be a proper guardian.

We have not failed to note that in the body of the complaint are some allegations that the defendant directors owed certain duties to the plaintiff's intestate in the way of retaining and investing various moneys. While these allegations may be somewhat superfluous, they are not and could not well be claimed to set forth any separate cause of action.

We also note that the prayer for relief asks that plaintiff be paid her claim, and that the defendant Gray be held personally liable in certain contingencies. Such relief may be outside of that which a court of equity would feel justified in awarding upon the trial of this case, and while it is too well settled to require extensive statement that the prayer for relief in a complaint may be looked to as explaining and characterizing the nature of the complaint itself, it would be unreasonable to regard these particular demands for relief, even though unjustifiable, as impressing upon the complaint before us the fault of containing various causes of action.

The order should be affirmed, with costs.

All concurred, except McLENNAN, P. J., and WILLIAMS, J., who dissented.

Order affirmed, with costs.

Cases
DETERMINED IN THE
FIRST DEPARTMENT
IN THE
APPELLATE DIVISION,
April, 1904.

MARY SEXTON, as Administratrix, etc., of EDWARD SEXTON, Deceased, Respondent, v. THE ONWARD CONSTRUCTION COMPANY, Appellant.

Evidence — a witness, cross-examined as to whether he gave certain testimony on a coroner's inquest, should be permitted to state on his redirect examination whether he gave certain other testimony thereon.

Where, upon the trial of an action to recover damages resulting from the death of the plaintiff's intestate, caused by the alleged negligence of the defendant, one of the defendant's witnesses, who, previous to the trial, had testified as to the accident on a coroner's inquest, is cross-examined as to whether, at the coroner's inquest, certain questions were not put to him and whether he did not make certain answers thereto, such witness should, upon his redirect examination, be permitted to state whether certain other questions relating to the subject upon which he had been cross-examined had not been put to him at the coroner's inquest, and whether he did not make certain answers thereto.

APPEAL by the defendant, The Onward Construction Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 7th day of November, 1903, upon the verdict of a jury for \$18,000, and also from an order entered in said clerk's office on the 5th day of November, 1903, denying the defendant's motion for a new trial made upon the minutes.

John M. Stearns, for the appellant.

Thomas D. Adams, for the respondent.

VAN BRUNT, P. J.:

This action was brought to recover damages for the death of one Edward Sexton, plaintiff's intestate, it being charged that such death was the result of the negligence of the defendant. The deceased was an employee of the Pittsburg Plate Glass Company, which company had a contract with the defendant, the owner of the building at which the accident in question happened, for the furnishing and placing of certain glass in the building, and he was employed in the building on that work on the day the accident happened. In the morning of the 13th day of February, 1903, the deceased was caught while attempting to get into one of the elevators in the building, and crushed to death.

In view of the conclusion at which we have arrived in respect to errors committed in the introduction of evidence, it is not necessary to discuss the question as to the weight of the evidence relating to the way in which the accident happened. It appears that there was an examination before the coroner as to the accident, and that among the witnesses examined before him was Adolphus B. Webb. He was also a witness for the defendant upon this trial, and upon his cross-examination various questions were put to him as to his testimony before the coroner, and he was asked if certain questions were not asked him, and whether he did not make certain answers to them. Upon the redirect examination the witness was asked whether certain other questions were not put to him upon that occasion relating to the same subject upon which he had been cross-examined as to his evidence before the coroner, and when he had answered in the affirmative the court refused to allow the witness to state whether he did not make certain answers thereto.

This, we think, was error. The counsel for the plaintiff, in his cross-examination, having asked the witness as to the statements made by him before the coroner, the counsel for the defendant had the right to show to the jury what was the whole of the statement of the witness before the coroner upon the subject as to which he was cross-examined. If a part of the statement of a witness is offered in evidence by one party, the other party has the right to offer the remainder of his statement relating to the subject upon which he was cross-examined. (*Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Taft v. Little*, 178 id. 127.) The circum-

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stances as to which the witness was testifying were part of those attending the accident itself; and, therefore, it was most essential, if part of the statement made by the witness before the coroner was introduced, that the whole of it should be before the jury, in order that improper deductions should not be drawn therefrom.

For this error we think that the judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

O'BRIEN, INGRAHAM, McLAUGHLIN and HATCH, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

AETHUR W. HART, Respondent, v. L. D. GARRETT COMPANY,
Appellant.

Contract to pay a portion of the profits realized on a sale to the party introducing the purchaser — when an action brought by such party to recover his full share of the entire profits is premature.

March 8, 1900, the L. D. Garrett Company, a corporation engaged in the business of buying and selling stocks of insurance companies, entered into the following contract with one Hart: "In consideration of One dollar and services to be performed by you, as hereinafter stated, we hereby agree to pay you one-fifth of any profits (after deducting all expenses) which *we may realize* from the sale of any insurance company or the sale of any insurance company's stock to any person, persons, corporations or their managers that you may name or introduce to us or our representative or firm within thirty days from this date. The said payment of one-fifth to be made to you *as soon as we receive our compensation or commission.* If paid to us by note, or otherwise, due at any future time, we agree to pay your share in cash, less the usual bank discount."

The contract did not limit the right of the Garrett Company to fix the terms of the contracts which it might make with purchasers.

Through the efforts of Hart, the Garrett Company sold the stock of the Orient Fire Insurance Company of Hartford, Conn., to the London and Lancashire Fire Insurance Company, realizing a nominal profit of \$143,000. Seventy seven thousand dollars of this sum was paid to the Garrett Company, of which \$82,500 was chargeable to the expense account. The contract between the London and Lancashire Fire Insurance Company and the Garrett Company provided that the former company should be entitled to retain in its possession, out of the \$143,000 payable to the Garrett Company, the sum of \$65,000 for a period of three years as a guaranty that certain assets of the Orient Fire Insurance Company would realize a certain amount.

June 25, 1900, the Garrett Company paid Hart \$6,500 and the parties executed the following instrument: "Received upon within contract the sum of Six Thousand and Five hundred Dollars (\$6,500). The balance under this contract, if any found to be due, shall be determined and paid to the within named A. W. Hart within (90) ninety days from the date hereof by said L. D. Garrett Co., the said A. W. Hart reserving all his rights under this contract."

No determination of the amount due to Hart was made within the ninety days mentioned in the contract.

In October, 1900, Hart brought an action against the Garrett Company to recover the further sum of \$21,500, upon the theory that the defendant had made a profit of \$148,000 upon the transaction and that plaintiff was entitled to one-fifth of that amount.

Held, that the action was prematurely brought;

That the plaintiff was only entitled to share in the amount of profits actually realized and received by the defendant either in the way of payment or of something equivalent to payment.

APPEAL by the defendant, the L. D. Garrett Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 22d day of December, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 21st day of December, 1903, denying the defendant's motion for a new trial made upon the minutes.

Lewis L. Delafield, for the appellant.

William B. Ellison, for the respondent.

PATTERSON, J.:

The real question involved in this case relates to the plaintiff's right to maintain this action at the time it was instituted; and I am of the opinion that it was prematurely brought and that under the contract made by him with the defendant and under the evidence appearing in the record, although he may be entitled to recover in another action as the facts may be made to appear hereafter, no cause of action existed when this suit was brought. The solution of the question depends largely, if not altogether, upon the construction of written instruments. The facts are simple. The defendant is a corporation which seems to have been engaged in the business, among other things, of buying and selling insurance stocks. On March 8, 1900, it entered into a contract with the plaintiff in the following words: "In consideration of One dollar and services to be performed by you, as hereinafter stated, we hereby agree to pay

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you one-fifth of any profits (after deducting all expenses) which *we may realize* from the sale of any insurance company or the sale of any insurance company's stock to any person, persons, corporations or their managers that you may name or introduce to us or our representative or firm within thirty days from this date. The said payment of one-fifth to be made to you *as soon as we receive our compensation or commission.* If paid to us by note, or otherwise, due at any future time, we agree to pay your share in cash, less the usual bank discount. This letter signed in duplicate and made a contract, all names of persons or companies to be noted on the back of this contract for identification."

Under this contract the plaintiff introduced to the defendant the manager of the London and Lancashire Fire Insurance Company, and an arrangement was made by which that company purchased the stock of the Orient Fire Insurance Company of Hartford, Conn., and out of this transaction the defendant was entitled nominally to a fee or profit, or compensation, as it may be called, of \$143,000. It is proven that of this some \$77,000 was paid to the defendant, but it is admitted that from that last-mentioned amount the sum of \$62,500 is to be deducted as expenses of the defendant. It is unnecessary to inquire into the details of these expenses, because the plaintiff testified that he knew that amount was to be allowed for expenses and that the defendant must be credited therewith. In the arrangement that was made for the purchase by the London and Lancashire Fire Insurance Company of the Orient Fire Insurance Company stock it was required by the purchaser that \$65,000 of the \$143,000 to go to the defendant should be retained by the purchaser for three years as security or a guaranty that certain assets of the Orient Company would bring the sum of \$287,000 and certain other assets, \$118,000 within that time, and this \$65,000 was to be retained from the purchase money and kept in the hands of the purchaser until the expiration of the three years mentioned.

It is to be observed that in the contract made between the plaintiff and the defendant nothing whatever is said or suggested as to terms upon which contracts might be made by the defendant with purchasers. That was a matter resting entirely within the discretion of the defendant. All that the plaintiff was entitled to was one-fifth of profits *realized* and *received* by the defendant, either actually in

cash, or, if paid by note or otherwise due at a future time, the plaintiff was to receive his share in cash, less bank discount. The proper construction of this contract is obvious. That to which the plaintiff was entitled was one-fifth of what was actually realized and received by the defendant, either in the way of payment or something that was equivalent to payment, and which could be realized upon. There was no limitation in this contract upon the right of the defendant to provide for contingent compensation or to contract with the purchaser that part of the money to which it, the defendant, would be entitled should be deferred in payment or should be contingently or conditionally payable. Here, nothing was received, except the \$77,000, from which the expenses were to be deducted, and the rest remained unpaid, unrealized and unreceived, and the plaintiff's right to payment was limited to his share of what was actually realized and received or came into the possession of the defendant. The plaintiff was paid \$6,500. He brought this suit [October 6, 1900] to recover in addition thereto the sum of \$21,500, placing his claim upon the theory that the defendant made and realized a profit of \$143,000 and that as a consequence he was entitled to one-fifth of that amount. The verdict of the jury was for \$9,000, which evidently was based upon the idea that \$143,000, less the \$62,500 expenses, had actually been realized by the defendant. It is claimed by the plaintiff that there is evidence which shows that he and the president of the defendant construed the contract for themselves and that the defendant's president admitted before the action was brought that there was a sum of \$15,000, at least, due to the plaintiff on the contract; and that that evidence is controlling and entitled the plaintiff to a verdict. The plaintiff did testify that he had a conversation with Mr. Garrett, the president of the defendant, in which it was stated that certain amounts of money were received from the London and Lancashire Fire Insurance Company and that the defendant's president agreed to pay to Mr. Hart the sum of \$13,000 in cash and to give him a mortgage for \$1,500, and the plaintiff swears that he accepted that proposition. But this conversation was prior to June 25, 1900, on which date a new (or modification of the old) agreement was made between the plaintiff and the defendant. There can be no mistake about the nature of the transaction that took place on the 25th of June, 1900,

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because it is specifically alleged in the complaint as a new agreement. On that day the plaintiff was paid \$6,500, and upon receiving that money, he and the defendant, by its president, signed an instrument in the following words: "Received upon within contract the sum of Six Thousand and Five hundred Dollars (\$6,500). The balance under this contract, if any found to be due, shall be determined and paid to the within named A. W. Hart within (90) ninety days from the date hereof by said L. D. Garrett Co., the said A. W. Hart reserving all his rights under this contract." That new agreement was indorsed upon the first-mentioned instrument. It is evident from this, that no previous binding arrangement or agreement as to what was due or owing or payable by the defendant to the plaintiff had been made. The balance under the contract, if any were found to be due, was to be determined and paid within ninety days. The original contract was preserved, no change or alteration whatever was made in the terms with respect to the plaintiff being entitled to anything until it was realized or received by the defendant. It left the parties, with reference to that, just where they were, and there is nothing to show that anything was done as to the determination, within ninety days after the signing of the modification of the contract, of what was due to the plaintiff.

It seems to me, therefore, that the action was prematurely brought and that the judgment and order should be reversed and a new trial ordered, with costs to appellant to abide the event.

VAN BRUNT, P. J., INGRAHAM, HATCH and LAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

MILDRED ROSE WEBER, Respondent, v. CHARLES WEBER, Appellant.

Refusal of a husband to pay alimony pendente lite—the wife's remedy is under sections 1772 and 1778 of the Code of Civil Procedure—an execution cannot be issued nor proceedings supplementary thereto be maintained against the husband.

The remedy for the failure of a husband to comply with an order, made in an action brought by his wife to obtain a separation, directing him to pay her a certain sum per week for her support during the pendency of the action, is prescribed by section 1772 and section 1778 of the Code of Civil Procedure.

Such an order is not an order directing the payment of a "sum of money" within the meaning of section 779 of the Code of Civil Procedure which provides that an execution may issue to enforce such an order.

The issue of an execution against the husband to enforce the order is, therefore, unauthorized, and the return of the execution unsatisfied does not entitle the wife to institute supplementary proceedings against her husband under section 2435 of the Code of Civil Procedure.

APPEAL by the defendant, Charles Weber, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of January, 1904, denying the defendant's motion to vacate an order theretofore granted herein for the examination of the defendant in proceedings supplementary to execution.

Abraham Levy and Henry W. Unger, for the appellant.

George Robinson, for the respondent.

INGRAHAM, J.:

This action was brought for a separation, and upon motion the defendant was ordered to pay to the plaintiff five dollars a week for her support during the pendency of the action. This order was duly served upon the defendant, who failed to comply with its direction, so that on the 16th day of December, 1902, there was due thereunder the sum of \$146.11. The action was brought on for trial and on the 16th day of December, 1902, a decision was filed directing a dismissal of the complaint and on the same day judgment thereon was entered. Subsequently, on the 4th of November, 1903, an execution was issued to the sheriff of the county of New York to enforce this order which was returned unsatisfied. Thereupon the plaintiff obtained an order for the examination of the defendant in proceedings supplementary to execution under section 2435 of the Code of Civil Procedure. That section provides that "At any time within ten years after the return, wholly or partly unsatisfied, of an execution against property, issued upon a judgment, as prescribed in section twenty-four hundred and fifty-eight of this act, or, in case of an order, issued in the same manner so far as the provisions of said section can be applied in substance, the creditor under such judgment or order, upon proof of the facts, by affidavit or other

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competent written evidence, is entitled to an order, requiring the debtor under the judgment or order, to attend and be examined concerning his property, at a time and place specified in the order."

To entitle a party seeking to enforce an order directing the payment of a sum of money to institute a proceeding under this section, he must have been authorized by the Code to issue an execution to enforce such order. The only provision in the Code which allows an execution to be issued to enforce an order is contained in section 779, which provides that "Where costs of a motion, or any other sum of money, directed by an order to be paid, are not paid, * * * an execution against the personal property only of the party required to pay the same, may be issued by any party or person to whom the said costs or sum of money is made payable by said order. * * * But nothing herein contained shall be so construed as to relieve a party or person from punishment as for contempt of court for disobedience to an order in any case when the remedy of enforcement by such proceedings now exist.*" The order here referred to is one specifically directing the payment of "costs of a motion, or any other sum of money." The order here sought to be enforced was granted under section 1769 of the Code of Civil Procedure, which provides that "Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties;" and under section 1771, which provides that "Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must * * * give, either in the final judgment, or by one or more orders, made from time to time, before final judgment, such directions, as justice requires, between the parties, for the custody, care, education and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff." The court by these two sections is given power

* *Sic.*

to order the husband to make suitable provision for the support of the wife and children ; and orders are to be made from time to time, as shall be necessary, to secure that object ; and by subsequent sections of the Code ample provision is made to enforce such orders. Thus section 1772 of the Code provides that where an order requires the husband to provide for the education or maintenance of any of the children of the marriage, or for the support of his wife, the court may, in its discretion, require him to give reasonable security, and if he fails to give it, or to make any payment required by the terms of such order, or to pay any sum of money which he is directed to pay by an order made as prescribed in section 1769 of the Code, the court may order his personal property and the rents and profits of his real estate to be sequestered and may appoint a receiver thereof. The rents and profits and other property so sequestered may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section as justice requires. Section 1773 provides that where the husband makes default in paying any sum of money specified in such an order, and it appears to the satisfaction of the court that payment cannot be enforced by means of sequestration proceedings, the court may enforce the order by proceedings in contempt.

Considering section 779 in connection with the provision in relation to orders in actions for a divorce or separation, it would appear that it was not intended to include those orders within the scope of section 779 ; and that a proceeding to enforce an order in an action for divorce or separation providing for the support of the wife and children must be in accordance with the special provisions for enforcing such an order. An order for the support of a wife and children is not an order which simply directs the payment of a sum of money. Maintenance and support may involve the payment by the husband of various sums of money at various times necessary to accomplish that purpose. Section 779 of the Code was intended to apply to an order directing the payment of a sum of money, the provisions of which order will be satisfied upon payment being made as in the case of a judgment for a sum of money, where the payment of the amount specified satisfies the judgment. It was recognized that where a husband is required to make payments from

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time to time for the support of his wife and children, enforcement of such an order by execution under section 779 of the Code would be ineffectual ; and a special proceeding was authorized which would accomplish that purpose ; and that proceeding having been prescribed, it would seem to follow that the enforcement of the order must be in accordance with it.

We think, therefore, that an execution under section 779 of the Code to enforce the order requiring the defendant to pay for the maintenance of his wife was not authorized and this proceeding cannot be maintained.

It follows that the order appealed from must be reversed and the order for the examination of the defendant vacated, without costs.

VAN BRUNT, P. J., PATTERSON, McLAUGHLIN and HATCH, JJ., concurred.

Order reversed and motion granted, without costs.

ABRAHAM GOODKIND, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Negligence — passenger standing up in a street car, grasping a strap, thrown down and injured by a violent jerk of the car — when a charge that the plaintiff was entitled to recover, if the jury found certain facts, is improper.

Upon the trial of an action to recover damages for personal injuries, sustained by the plaintiff while a passenger upon one of the defendant's street cars, the plaintiff gave testimony tending to show that while standing up in the car, holding on to a strap provided for that purpose, the car, after coming to a stop, started with a violent jerk which caused him to lose his hold upon the strap and to be thrown down and injured.

The court charged, at the request of the plaintiff, and over the defendant's exception, "If the jury find that the particular car upon which the plaintiff was a passenger was caused to start forward without notice or warning to the plaintiff from a position of rest with a sudden and unusual lurch forward, so violent as to cause the plaintiff and other passengers in the car to be thrown in the manner testified to by plaintiff and his witness Minzesheimer, and if the jury further find that the car could have been started by the exercise of a reasonable degree of skill and care on the part of the motorman controlling the car without such sudden, violent and unusual lurch, provided they believe there

was such sudden, violent and unusual lurch at all, and if they should further find that the seats in the car were all occupied, and that plaintiff was standing inside the car, holding on to a strap provided for such purpose, at the time of such lurch, and was solely by reason thereof thrown down and received the injuries that were testified to in this case, then the plaintiff would be entitled to a verdict."

Held, that the charge was erroneous, in that it permitted the jury to find the defendant liable, without finding that it had been guilty of negligence, or that such negligence was the proximate cause of the accident, or that the plaintiff was free from contributory negligence;

That the fact that the car had started with a jerk and that it could have been started without a jerk did not establish, as a matter of law, that the defendant had been guilty of negligence; that this question was one of fact for the jury to determine.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 11th day of July, 1903, upon the verdict of a jury for \$4,000, and also from an order entered in said clerk's office on the 2d day of July, 1903, denying the defendant's motion for a new trial made upon the minutes.

Charles F. Brown, for the appellant.

Otto Horwitz, for the respondent.

INGRAHAM, J.:

The plaintiff, a passenger upon one of the defendant's cars, was standing in the car holding on to a strap provided for the use of passengers. While in this position he was thrown or fell and sustained injuries for which he has recovered in this action. He testified that the car came to a stop, and was started with a violent jerk which caused him to lose his hold upon the strap, and he was thrown down. The learned counsel for the appellant admits that the evidence justified the submission of the case to the jury, but relies upon two exceptions, one to the admission of testimony and the other to the charge of the court made at the plaintiff's request.

We are forced to reverse this judgment because of the exception to the charge relied upon by the defendant. The court, at the request of the defendant, had charged that "the burden of proof

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in this action rests upon the plaintiff to establish both the essential elements in his cause of action, to wit, the negligence of the defendant and the absence of any negligence on the part of the plaintiff, and the plaintiff is bound to make out more than a balanced case." Not satisfied with this the plaintiff's counsel requested the court to charge: "If the jury find that the particular car upon which the plaintiff was a passenger was caused to start forward without notice or warning to the plaintiff from a position of rest with a sudden and unusual lurch forward, so violent as to cause the plaintiff and other passengers in the car to be thrown in the manner testified to by plaintiff and his witness Minzesheimer, and if the jury further find that the car could have been started by the exercise of a reasonable degree of skill and care on the part of the motorman controlling the car without such sudden, violent and unusual lurch, provided they believe there was such sudden, violent and unusual lurch at all, and if they should further find that the seats in the car were all occupied, and that plaintiff was standing inside the car, holding on to a strap provided for such purpose, at the time of such lurch, and was solely by reason thereof thrown down and received the injuries that were testified to in this case, then the plaintiff would be entitled to a verdict." The court charged as requested and the defendant excepted.

Where the liability of a defendant is based upon negligence, to establish such liability the jury must find that the injury was caused by the negligence of the defendant, and it is error for the court to charge as a matter of law that if the facts are as testified to by the plaintiff's witness, the plaintiff is entitled to a verdict. (*Kellegher v. Forty-second St., etc., R. R. Co.*, 171 N. Y. 309.) The application of the maxim *res ipsa loquitur* will under certain circumstances sustain a finding of negligence, but this is simply an application of the principle that a fact may be proved by circumstantial evidence. Where that maxim is applicable there must still be a finding of negligence by the jury based upon competent evidence to entitle the plaintiff to a verdict, and the question as to whether negligence existed is a question which must be determined by the jury and not by the court as a matter of law. This rule has been constantly reiterated in this court and in the Court of Appeals. It is quite proper for the court to instruct the jury that if they find that a cer-

tain condition existed, then a question as to whether the defendant was or was not guilty of negligence is presented for their consideration, and a finding that the defendant was guilty of negligence would be sustained. But that is a very different proposition from a statement to the jury that if they find certain facts the plaintiff is entitled to a verdict. In such a direction the jury are charged as a matter of law that the facts stated constitute negligence, instead of leaving the question as to whether there was negligence for the jury to determine.

The questions for the jury were : Did the defendant's employee start the car with a jerk which threw the plaintiff down and injured him, and, if they did, was such a starting of the car negligence? An instruction to the jury that if the car started with such a jerk, and it could have been started without the jerk, the plaintiff was, as a matter of law, entitled to a verdict, withdrew from the jury the crucial questions which they were required to determine, namely, whether any act of the defendant's employees which was negligent caused the jerk which injured the plaintiff. As was said by MARTIN, J., in *Kellegher v. Forty-second St., etc., R. R. Co. (supra)*: "The standard by which the defendant's acts were to be judged was also largely a question of fact, and whether the acts proved came up to or were below that standard was peculiarly a question for the jury."

There was evidence on the part of the defendant that the plaintiff was seated in the car before the car started, and that there was no violent jerk caused by any act of the defendant's motorman, or those engaged in operating the car ; and yet the jury were instructed that if they found that the car started with a jerk and plaintiff was thrown as testified to by the plaintiff and Minzesheimer, the plaintiff was entitled to a verdict without requiring the jury also to find that the starting of the car by the defendant in the manner described was the cause of the accident. Not only must the negligence of the defendant be established, but such negligence must be shown to be the proximate cause of the accident. This charge violated the established rules in relation to what it was necessary for the jury to find in order to establish the defendant's liability, both in failing to require the jury to find the defendant guilty of negligence, and in permitting a verdict for the plaintiff without a finding that such negligence was the proximate cause of the accident and that the

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plaintiff was free from contributory negligence. It follows that the judgment and order must be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATCH, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

EDWARD L. LEWIS, Appellant, *v.* GUARDIAN FIRE AND LIFE ASSURANCE COMPANY (LIMITED) OF LONDON, ENGLAND, Respondent, and CHARLES A. K. MACPHEESON, Appellant.

Fire insurance policy containing a mortgagee clause—the mortgagee's right to recover is dependent upon that of the insured—the mortgagee is a necessary party to an action brought by the insured upon the policy—jurisdiction, where the mortgagee is a non-resident—an agent of the insurance company may waive a prohibition as to other insurance—the continuation of existing insurance does not constitute "other insurance"—when the question of agency is one of fact.

Where a policy of fire insurance is made payable to a mortgagee of the insured property, as his interest may appear, if the policy is void as to the insured, it cannot be enforced by the mortgagee.

The mortgagee is a necessary party to an action brought by the insured to recover upon the policy. He may join with the insured in bringing the action, and, if he refuses to do so, the insured may make him a party defendant.

Where a foreign insurance corporation authorized to do business in the State of New York issues, at its office in Montreal, Canada, a policy of fire insurance to a New York corporation upon property located in Canada, containing a provision that the loss, if any, shall be payable to "John G. Foster, Esq., agent for mortgagee, as his interest may appear," and, subsequent to the destruction of the property by fire, the insured corporation assigns its claim to a resident of the State of New York, and the latter brings an action in the Supreme Court of the State of New York to recover upon the policy, making a resident of Canada, who had acquired the interest of the mortgagee referred to in the policy, a party defendant, he having refused to become a party plaintiff, the court has jurisdiction to entertain the cause of action as to such non-resident defendant.

Knowledge on the part of an agent of a fire insurance company, at the time he issues a policy of fire insurance, that there is other insurance on the property, is attributable to his principal, and constitutes a waiver of a provision in the policy that it should be void if, at the time it was issued, the insured had, or thereafter procured, other insurance upon the property.

In such a case the fact that, previous to the happening of a loss under the policy, the insurance existing upon the property at the time of the issuance of the policy has been continued by means of renewals of the existing policies, or by substituting others therefor, does not constitute a breach of the condition as to "other insurance."

In an action upon a policy of fire insurance, in which the issue litigated was whether the firm of Paterson & Son, who delivered the policy to the insured, were the agents of the defendant insurance company, it appeared that the policy sued upon contained the words, "Agency Montreal, Paterson & Son," and that indorsed upon it were the words, "Paterson & Son, agent, Montreal Agency," and that these were written in and upon the policy by the defendant insurance company; that when the application for the policy was made an interim receipt was issued containing the words, "Paterson and Son, Agency."

A witness for the plaintiff testified that he had known Paterson & Son twelve or thirteen years, during which time they had been managers of the defendant insurance company. A member of the firm of Paterson & Son testified, on behalf of the defendant insurance company, that at the time the policy was issued he was not the agent of the defendant insurance company and had never issued any policies for it. The manager of the defendant insurance company also testified that neither the firm of Paterson & Son nor any member of it was the agent of the defendant insurance company.

Held, that it was error for the court to determine, as a matter of law, that the firm of Paterson & Son were not the agents of the defendant; that the question was one of fact for the jury to determine.

APPEAL by the plaintiff, Edward L. Lewis and by the defendant Charles A. K. MacPherson, from a judgment of the Supreme Court in favor of the defendant Guardian Fire and Life Assurance Company (Limited) of London, England, entered in the office of the clerk of the county of New York on the 14th day of January, 1904, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term.

William B. Ellison, for the appellant Lewis.

Rufus L. Weaver, for the appellant MacPherson.

George A. Strong, for the respondent.

McLAUGHLIN, J.:

On the 20th of July, 1899, the Owl's Head Hotel Company, a New York corporation, procured from the defendant the Guardian Fire and Life Assurance Company (Limited), a foreign corporation, a policy of fire insurance in and by which it insured certain prop-

erty located in Canada against loss or damage by fire, to the extent of \$4,000, with the "loss, if any, payable to John G. Foster, Esq., agent for mortgagee, as his interest may appear." During the term of the policy the property was destroyed by fire and a loss sustained in excess of that covered by the insurance. The insurance company refused to pay the loss covered by its policy, and thereupon the plaintiff, a resident of the State of New York, as the assignee of the insured, brought this action to recover thereon, making MacPherson, a resident of Canada, who had acquired the interest of the mortgagee referred to in the policy, a party defendant, he having refused to join with the plaintiff in bringing the action.

At the trial, after the plaintiff and MacPherson had rested, the complaint, in so far as it related to the latter, was dismissed, upon the ground, as appears from the opinion of the trial justice, that the "court has no jurisdiction over his cause of action, however asserted, nor can it acquire jurisdiction by indirection, or by any device of pleading, practice or procedure." Exception was duly taken to this ruling by both MacPherson and the plaintiff. The trial court, however, refused to dismiss the complaint against the insurance company, holding as the case then stood, a question of fact was presented for the jury and that the action could be continued by the plaintiff to recover the difference between the amount which had been proved to be due MacPherson and the amount of the policy. The action was then continued and at the close of the whole case a verdict was directed for the insurance company, upon the ground that the evidence established a violation by the plaintiff of the terms of the policy which rendered it void, to which an exception was taken by the plaintiff. Judgment was thereafter entered, from which the plaintiff and MacPherson have appealed.

The judgment appealed from, unless erroneous as to the plaintiff, is not as to the appellant MacPherson; in other words, unless the plaintiff had a policy of insurance which he could enforce against the insurance company, then a mortgagee of his assignor could not enforce a provision inserted therein for his benefit, and if a verdict were properly directed as to the plaintiff, then it necessarily follows the judgment could not have injured MacPherson.

The appeal of the plaintiff, therefore, will be first considered. The policy contained a provision that it would be void if at the

time it was issued the insured had, or thereafter procured, other insurance upon the property covered by the defendant company's policy, unless otherwise provided by agreement indorsed thereon or added thereto, and it was upon this ground that the verdict was directed. The evidence on the part of the plaintiff bearing upon the other insurance was to the effect that the respondent's policy of insurance was procured through Paterson & Son, of Montreal, Canada, by Mr. Watkins, general manager of the Owl's Head Hotel Company; that at the time he applied for it he informed a member of the firm of Paterson & Son what insurance was then upon the property and that he desired additional insurance to the amount of \$10,000, which it procured — \$6,000 in the Phoenix Insurance Company of London, and \$4,000 in the defendant insurance company. In the policy issued by the respondent reference was made to the \$6,000 insurance in the Phoenix, but not to the other insurance, amounting to \$4,500, which was upon the property at the time the application was made and the policy written. The fact that Paterson & Son knew there was \$4,500 insurance upon the property at the time Watkins applied for the \$10,000 additional insurance was not denied, at least no evidence was offered to contradict plaintiff's evidence on that subject, but it was insisted that such information in no way affected the respondent's liability, inasmuch as Paterson & Son was not its agent and had no power to waive any of the provisions of the policy. Of course, if Paterson & Son were the agents of the insurance company, I take it no one would seriously question but what they could — having full knowledge of other insurance — waive the provisions of the policy with reference thereto. The company could do it, and what it could do itself it could do through an agent. This rule seems to be well settled. (*Gray v. Germania Fire Ins. Co.*, 155 N. Y. 180; *Robbins v. Springfield Fire Ins. Co.*, 149 id. 477; *Wood v. American Fire Ins. Co.*, Id. 382; *Forward v. Continental Ins. Co.*, 142 id. 382; *McNally v. Phoenix Ins. Co.*, 137 id. 389; *Short v. Home Ins. Co.*, 90 id. 16; *Woodruff v. Imperial Fire Ins. Co., London, Eng.*, 83 id. 133; *Richmond v. Niagara Fire Ins. Co.*, 79 id. 230.) Thus, in the first case cited the court said: "It is well settled in this State that where an insurance company issues a policy with full knowledge of facts which would render it void in its inception, if its provisions

were insisted upon, it will be presumed that it by mistake omitted to express the fact in the policy, waived the provision, or held itself estopped from setting it up, as a contrary inference would impute to it a fraudulent intent to deliver and receive pay for an invalid instrument." The fact being uncontradicted that Paterson & Son were informed as to the insurance upon the property at the time application was made for the additional \$10,000, the crucial question is whether Paterson & Son were the agents of the defendant insurance company. If they were, then the information which they had was the information of the respondent. (*Robbins v. Springfield Fire Ins. Co., supra*; *Wood v. American Fire Ins. Co., supra*.) Bearing upon this question, it appeared from the plaintiff's proof that the policy issued by the respondent contained the words, "Agency Montreal, Paterson & Son," and indorsed upon it were the words, "Paterson & Son, agent, Montreal Agency," all of which was written in and upon the policy when it was issued by the respondent itself before it was sent to Paterson & Son to be delivered to the insured. In addition to this, it appeared that when application was made for the insurance, what is termed an interim receipt was issued, which contained the words, "Paterson and Son, Agency," and the manager of the respondent testified that the agent of the company "issues an interim contract or risk," but "no agent with us issues a policy. All of our policies are issued upon application." Plaintiff's witness Watkins testified that he had known Paterson & Son twelve or thirteen years, during which time they had been managers of the respondent. On its part the defendant company called as a witness a member of the firm of Paterson & Son, who testified that at the time the policy was issued *he* had no relation with the company, was not its agent, and had never issued any policies for it. It is to be noticed, however, that this witness nowhere stated that the firm of Paterson & Son was not the agent or representative of the respondent when the policy was issued. The respondent's manager, Heaton, however, who was subsequently called, did testify that neither the firm of Paterson & Son, nor any member of it, was the agent of the defendant company and that neither had anything to do with it.

The foregoing is a summary of all the evidence bearing upon the question of agency, and upon this the trial court held, as a matter

of law, that Paterson & Son was not the agent of the respondent, and, therefore, had no power to waive any of the provisions of the policy, and he accordingly directed a verdict in favor of the respondent, as hereinbefore stated. In this, I think, he erred. I am of the opinion that upon this evidence it was a question of fact for the jury to determine whether or not, as between the plaintiff's assignor and the defendant insurance company, the firm of Paterson & Son was its agent in relation to this policy. (*Sundheimer v. City of New York*, 176 N. Y. 495; *McDonald v. Metropolitan St. Ry. Co.*, 167 id. 66.) The fact is undisputed that the respondent inserted in and indorsed upon the policy a statement which would at least lead a person of ordinary understanding to believe the firm was its agent. This, taken in connection with the statement to the same effect contained in the interim receipt and the testimony of the witness Watkins, was certainly some evidence to go to the jury, and this was the view entertained by the learned trial justice at the close of plaintiff's case. He then said, in denying respondent's motion to dismiss the complaint: "Whether Paterson & Son were or were not the agents of the defendant corporation is a question of fact upon the case as it now stands." This evidence certainly was not so far overcome by the testimony of the witness Heaton that the court could hold, as a matter of law, that such agency did not exist. But it is urged that even though it be conceded that Paterson & Son were the agents of the respondent, it did not appear that that firm had information at least as to some of the other insurance which was upon the property at the time the fire occurred; and in this connection attention is called to the fact that some of the insurance which was upon the property at the time the manager of the plaintiff's assignor applied for the \$10,000 additional insurance had, before the fire, expired and the same had been continued either by renewal or substitution of other insurance. I do not think this changed the legal rights of the parties. When the plaintiff's assignor applied to Paterson & Son that firm was then informed there was \$4,500 insurance upon the property and that \$10,000 additional insurance was desired. The continuation of the \$4,500 insurance, either by renewals of policies already thereon, or by substituting others therefor during the life of the respondent's policy, was not "other insurance" within the meaning of its policy. It was, at most, but a continuation of the existing

insurance. (*Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Brown v. Cattaraugus County Mut. Ins. Co.*, 18 id. 385.) Therefore, upon this branch, it seems to me the case should have been submitted to the jury.

This brings us to the consideration of the remaining question, and that is, whether the courts erred in dismissing the action as to the defendant MacPherson. The policy, as already indicated, provided that the loss, if any, should be payable to one Foster, agent for the mortgagee, as his interest might appear, and it was conceded upon the trial that the defendant MacPherson had succeeded to all the rights and interest in the policy which Foster had at the time the fire occurred. The defendant MacPherson resided in Canada. The respondent was a foreign corporation, authorized, however, to do business in this State. The policy was issued at its office in Montreal and the property insured was located in Canada. The learned trial justice was of the opinion that the court did not have jurisdiction of the subject-matter of the action so far as MacPherson was concerned, he and the respondent being non-residents; that if MacPherson, as mortgagee, had instituted the action in this State to assert his rights under the policy, the court would not have had jurisdiction and that jurisdiction could not be obtained by "indirection, or by any device of pleading, practice or procedure." This, to me, seems to be an erroneous conception as to the rights of the parties. The plaintiff was a resident of the State and his assignor was a domestic corporation. He was, therefore, entitled to bring the action, and it was just as much for his interest as for that of the defendant MacPherson to have the rights of all of the parties determined, to the end that the mortgage referred to might be satisfied. Not only this, but in an action by the plaintiff to enforce the policy, MacPherson was a necessary party (*Kent v. Aetna Ins. Co.*, 84 App. Div. 428; *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 516), and with his consent could have joined with the plaintiff in bringing it, but having refused to do that he was properly made a defendant. (*Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185; *Besant v. Glens Falls Ins. Co.*, 72 App. Div. 276.) The fact that MacPherson was a non-resident and the respondent a foreign corporation is of no importance, inasmuch as the contract was made with plaintiff's assignor, a resident of this State, and the plaintiff, as its repre-

sentative, has the right to enforce that contract in the courts of this State, and to that end have the proper parties before the court.

It follows, therefore, that the judgment appealed from must be reversed and a new trial ordered, with costs to each appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Judgment reversed, new trial ordered, costs to each appellant to abide event.

CITY OF IRONWOOD, Respondent, *v.* THOMAS P. WICKES, as Receiver of the Late Firm of COFFIN & STANTON, Appellant, Impleaded with WILLIAM E. COFFIN and WALTER STANTON, Members of and Composing the Copartnership or Firm of COFFIN & STANTON, and Others.

Contract — a party seeking to rescind it must make restitution or allege his willingness to do so — action to recover the purchase price of void municipal bonds — the purchaser must return all of such bonds — the return of a portion thereof is insufficient.

In every action to rescind a contract, it is, in the absence of fraud, incumbent upon the party seeking to rescind, as a condition precedent to his right to obtain such relief, to restore the benefits received, or to offer to restore such benefits upon the trial; if restoration has not been made prior to the commencement of the action, willingness and ability to restore must be alleged in the pleading and such allegation be complied with at the trial.

A firm which purchases municipal bonds of the par value of \$150,000 and pays the obligor city \$25,000 on account of the purchase price, is entitled, if the bonds are void, to rescind the purchase and to recover from the city the \$25,000, provided it is able to restore all of the bonds to the city.

Where, however, the firm has sold the bonds to third parties and is unable to obtain, for delivery to the city, more than \$132,000 of such bonds, leaving the remaining \$18,000 of the bonds outstanding in the hands of persons as to whom no adjudication has been made that their bonds are invalid, it is not entitled to recover the \$25,000 or any part thereof.

APPEAL by the defendant, Thomas P. Wickes, as receiver of the late firm of Coffin & Stanton, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of

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the county of New York on the 27th day of July, 1903, upon the report of a referee dismissing the counterclaim of the defendant receiver.

George C. Lay, for the appellant.

Lewis L. Delafield, for the respondent.

McLAUGHLIN, J.:

This appeal is from a judgment dismissing a counterclaim after trial before a referee. There is no dispute as to the facts, which, so far as material, are substantially as follows: In October, 1893, the firm of Coffin & Stanton, brokers, doing business in the city of New York, purchased for \$145,275 from the city of Ironwood, a municipal corporation organized under the laws of the State of Michigan, its bonds of the par value of \$150,000. Twenty-five thousand dollars of the purchase price was paid to the city at the time the bonds were delivered, and the balance agreed to be thereafter paid in installments at different times between the delivery and the 15th of May, 1894. Coffin & Stanton having defaulted in the payment of all of the installments, on the 19th of September, 1894, this action was brought against them to rescind the sale and recover possession of the bonds. The plaintiff alleged a tender to Coffin & Stanton, prior to the commencement of the action, of the sum of \$30,000; a demand for the return of the bonds, and the refusal of Coffin & Stanton to comply therewith. On the 3d of October, 1894, Coffin & Stanton interposed an answer, in which they denied that at the time the action was commenced any of the bonds were in their possession. On the day following, in an action brought by Stanton for the dissolution of the firm of Coffin & Stanton, in the United States Circuit Court for the southern district of New York, one Erb was appointed receiver of all the assets of that firm and he continued to act as such until the 12th of July, 1896, when he resigned, and the appellant Wickes was duly appointed in his place. In February, 1897, Wickes, as receiver, by leave of the court, intervened in this action and served an answer in which he sought, by way of counterclaim, to recover from the city the \$25,000 paid to it by Coffin & Stanton at the time the bonds were delivered, upon the ground, among others, that it had been determined in an action brought by

the Manhattan Company in the Circuit Court of the United States for the western district of Michigan against the city of Ironwood, that the bonds referred to were invalid and of no effect. The city, for some reason, failed to reply to the counterclaim within the statutory time (Code Civ. Proc. § 520) and by reason thereof Wickes obtained a judgment for the amount claimed. Subsequently the city applied for leave to open the default and serve a reply, which was denied if, within ninety days from the date of the order, the receiver should tender to the city all the bonds, with the coupons attached, referred to in the complaint; otherwise the motion was granted upon certain conditions. The receiver did not tender the bonds within the ninety days and the plaintiff thereupon, complying with the conditions named, interposed a reply in which it alleged that prior to the commencement of the action it offered to pay to Coffin & Stanton whatever sum that firm was equitably entitled to, upon the return to it of the bonds in question; that Coffin & Stanton did not return such bonds and they were unable to do so then and at the time the receiver was appointed, inasmuch as they had sold and disposed of all of them to numerous persons and corporations who owned or were the holders of the same for value, and that the receiver never owned the said bonds or became entitled to their possession or control; it also alleged that as against the present holders of the bonds, and any claims that might be asserted by them to recover any portion of the sum paid on account of the purchase price, it had a good defense. Subsequently certain holders of the bonds applied for leave to intervene in the action. The application, opposed by both the plaintiff and receiver, was denied and no appeal was taken from the order.

At the trial the plaintiff proved that at the time the action was commenced and the receiver appointed, Coffin & Stanton had sold or disposed for value of all of the bonds referred to in the complaint. Having made this proof, it consented to a nonsuit. The receiver thereupon proved the material facts set up in his counter-claim, *i. e.*, the payment of the \$25,000 by Coffin & Stanton to the plaintiff; the use thereof by it to pay an antecedent indebtedness; his appointment as receiver of that firm; the judgment rendered in the action brought by the Manhattan Company of the city of New York against the city of Ironwood in the Circuit Court of the

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United States for the western district of Michigan, in which it had been determined that certain of the bonds referred to in the complaint were invalid, and the affirmance of the judgment on appeal to the Circuit Court of Appeals for the sixth circuit (*Manhattan Co. v. City of Ironwood*, 74 Fed. Rep. 535); he also produced and offered to surrender to the plaintiff said bonds of the par value of \$132,000, with coupons attached, and to release it of and from all claims with reference thereto, provided judgment was rendered in his favor on his counterclaim, and, in connection with such offer, proved an agreement, and an order of the Circuit Court of the United States approving it, entered into on the 16th day of January, 1903, between himself and the trustee of the holders or owners of such bonds, authorizing him to make such offer and execute such release on the conditions specified by him.

During the course of the trial it also appeared that the balance of the bonds delivered to Coffin & Stanton of the par value of \$18,000 were held, \$3,000 by Dudley P. Ely and \$15,000 by the town of Greenburg, and that the receiver had endeavored, but had been unable, to procure possession thereof.

Upon the foregoing facts the referee reached the conclusion, as appears from his report and the opinion delivered, that the right of action, if any, to recover the consideration paid by Coffin & Stanton passed to and was vested in the persons to whom such bonds were sold or pledged prior to the appointment of the receiver of that firm; that the receiver took no title to such cause of action; that the agreement with the trustee of bondholders representing bonds of the par value of \$132,000 was ineffectual to vest in the receiver any right to recover, and he thereupon dismissed the complaint and the counterclaim, without costs.

I think the judgment appealed from should be affirmed, but not for the reasons assigned by the referee in granting it. If the receiver had been rightfully in possession of, and had surrendered at the trial all the bonds delivered to Coffin & Stanton, then it seems to me he would have been entitled to a judgment establishing his counterclaim. The action on the counterclaim was, in effect, one for a rescission of the contract between Coffin & Stanton and the city of Ironwood, and to recover from the latter the \$25,000 paid to it for money had and received. The receiver represented

Coffin & Stanton and occupied precisely the same position they would have occupied had they brought an action to recover this money. They could not have recovered without returning to the city all — not a part — of the bonds received. In every action to rescind a contract it is incumbent upon the party seeking to rescind, in the absence of fraud, as a condition precedent to the right to the relief asked, to have made restoration of the benefits received, or else, upon the trial, to offer to restore such benefits. Where such restoration has not been made prior to the commencement of an action, then willingness and ability to restore must be alleged and such allegation complied with at the trial. (*Gould v. Cayuga County National Bank*, 99 N. Y. 333; *Nelson v. Hatch*, 56 App. Div. 149.) Here, there is no allegation in the counterclaim to the effect that the receiver had either the willingness or ability to return all of the bonds delivered to Coffin & Stanton. This, however, was obviated by the reply, inasmuch as this omission in the pleading of the receiver was expressly waived. But the city did not waive the defense that all of the bonds must be produced and surrendered at the trial; on the contrary, it alleged that the receiver did not have the ability to do so inasmuch as the bonds were not owned or held by him. This fact was established at the trial, where it appeared, and was uncontradicted, that there were bonds of the par value of \$18,000 which were then owned by others and of which the receiver conceded his inability to obtain possession. This being so, he was not, upon any principle of which I am aware, entitled to a judgment. The purchase of the bonds and the payment of the money were one transaction and in order to recover the money paid, all of the bonds delivered must be returned. Part could not be returned and a proportionate recovery had therefor. Coffin & Stanton could not have recovered what they paid and at the same time retain either in whole or in part, what they had received. A rescission cannot be had where a benefit is retained. It is no answer to this suggestion that it has been determined in the action brought by the Manhattan Company against the city of Ironwood that the bonds involved in that action were invalid. This determination was binding only upon the parties to that action and did not legally affect the bonds held by others. The owners of the \$18,000 of bonds referred to were not, so far as appears, parties to that action, and,

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therefore, were not affected by it. These bonds are outstanding obligations of the city, and before it can be required to return the money received from Coffin & Stanton it is entitled to have them, with all of the others, returned.

I am, therefore, of the opinion that the judgment appealed from should be affirmed, with costs.

O'BRIEN, INGRAHAM and HATCH, JJ., concurred; VAN BRUNT, P. J., concurred in result.

Judgment affirmed, with costs.

CORNELIA C. FLAGG, as Administratrix, etc., of EMILY KENNEDY, Deceased, Respondent, v. ALMIRA G. FISK and HENRY B. KINGHORN, as Administrators, etc., of HENRY G. FISK, Deceased, Appellants.

Contract providing for the payment of a debt due to a third person — when enforceable by the latter — when a provision for the payment of ten per cent interest upon the debt does not render the contract usurious — a party repudiating all liability upon a contract cannot take advantage of conditions precedent contained therein — offer of firm books in evidence.

Thomas J. Flagg, who was a copartner of Henry G. Fisk, died intestate, leaving him surviving his widow, Cornelia C. Flagg, and a son and daughter. At the time of his death there was due from the firm to Emily Kennedy, the mother of Cornelia C. Flagg, the sum of \$24,651.82. For the purpose of avoiding a liquidation of the firm affairs, the said Cornelia C. Flagg, individually and for her mother, and the son and daughter of the said Thomas J. Flagg, entered into a contract with Henry G. Fisk, the surviving partner, by which they sold and assigned to him the firm business, with the right to continue the use of the firm name, in consideration of Fisk's agreement to pay to the said Cornelia C. Flagg, individually, the sum of \$3,000, and to pay to the said Emily Kennedy the amount which appeared to be due to her upon the firm books, together with interest thereon at the rate of ten per cent for a certain period and at the rate of six per cent thereafter. The contract provided that Emily Kennedy's claim should not become due and payable until all the other firm creditors had been paid.

In an action brought by Cornelia C. Flagg, as administratrix of the said Emily Kennedy against Fisk's personal representatives to recover the amount of the Kennedy claim,

Held, that the provision in the contract for the payment of ten per cent interest upon the amount of the Kennedy claim did not render it usurious, as the con-

sideration for Fisk's promise to pay the Kennedy claim was the sale of the copartnership business and the right to continue such business in the firm name without liquidating the partnership affairs, and not the loan or forbearance of the use of money, to which, alone, the statute relating to usury applies;

That the interest which the plaintiff, as a party interested in the estate of Thomas J. Flagg and as the sole heir at law and next of kin of Mrs. Kennedy, had in securing the payment of the debt due to the latter, was sufficient to entitle Mrs. Kennedy, or her personal representatives, to enforce the promise to pay such debt;

That, as the defendants had repudiated all liability upon the contract, the fact that the plaintiff failed to show that there were no outstanding firm debts remaining unpaid at the time of the commencement of the action did not constitute a defense;

That, as the existence of the debt and the amount thereof had been established by the firm ledger, independent of its recognition in the contract, the court properly declined to permit the defendants to offer in evidence all of the firm books.

APPEAL by the defendants, Almira G. Fisk and another, as administrators, etc., of Henry G. Fisk, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of December, 1903, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 5th day of January, 1904, denying the defendants' motion for a new trial made upon the minutes.

Henry B. Kinghorn, for the appellants.

Mortimer Kennedy Flagg, for the respondent.

HATCH, J.:

The plaintiff is the daughter and sole heir at law and next of kin of her intestate. The action is brought to recover damages for the breach of a contract under seal. The contract was made on or about July 21, 1900, under the following circumstances: On and prior to June 9, 1900, the defendants' intestate and Thomas J. Flagg were copartners, doing business under the firm name of Fisk, Clarke & Flagg. On June 9, 1900, Thomas J. Flagg died, leaving him surviving the plaintiff, his widow; Emily Lee Flagg, his daughter, and Mortimer Kennedy Flagg, his son, his only heirs at law and next of

kin. Upon Mr. Flagg's death Mr. Fisk, the defendant's intestate, became the sole surviving partner of said firm. It appeared that Mr. Fisk desired to avoid liquidation of the firm affairs and to continue the business without dissolution. At this time there appeared upon the books of the firm an indebtedness to the plaintiff's intestate in the sum of \$24,651.82, and the plaintiff, individually, her son and daughter and the plaintiff, for her mother, the said Emily Kennedy, entered into a written contract with the defendants' intestate under seal, in which they sold and assigned to the said Henry G. Fisk the entire business, of whatever nature, of the said firm of Fisk, Clarke & Flagg, with the right to continue the use of the firm name upon the consideration that the said Fisk should pay to this plaintiff, individually, the sum of \$3,000, and that there should be paid to the said Emily Kennedy the amount which appeared to be due to her upon the firm's books, together with interest thereon at the rate of ten per cent from the date of said contract until the 1st day of January, 1901, after which time it should draw interest at the rate of six per cent until fully paid ; that Emily Kennedy's claim should not become due and payable until all other creditors of the firm were fully paid. Mr. Fisk accepted the benefits of the contract upon his part, and continued the business under the old firm name. Subsequently he repudiated the contract by refusing to pay to said Emily Kennedy, or to her personal representatives, any sum whatever, whether interest or principal. Thereupon the plaintiff brought this action in her representative capacity, Mrs. Kennedy having died prior to the commencement thereof. Upon the trial the court directed a verdict for the full amount called for under the contract. Cornelia C. Flagg had previously brought an action to recover the amount due to herself personally, upon the said contract, and procured a judgment therefor, from which judgment the defendants appealed to this court, where the same was affirmed, without opinion.

The answer put in issue by several denials the execution of the contract its breach and other matters. For affirmative defenses it averred payment, usury, the Statute of Limitations and that nothing had become due by virtue of the contract, for the reason that it was not made to appear that all of the creditors of Fisk, Clarke & Flagg had been fully paid and discharged and that three months had

elapsed therefrom. The affirmative defenses were made the basis of a motion to dismiss the complaint at the close of the trial upon the proof of the plaintiff. The defendants offered no proof in their defense. While the contract provided that the creditors of the firm should be first paid prior to the discharge of Mrs. Kennedy's claim, yet it also appeared that the defendants repudiated the fulfillment of the contract *in toto* and claimed not to be bound thereby. The breach of the contract, therefore, upon their part being established, a cause of action immediately accrued in favor of the parties affected thereby without regard to conditions precedent contained in the contract. (*Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Howard v. Daly*, 61 id. 362.) The contract made between the parties was founded upon a valuable consideration, and as such, is clearly enforceable, assuming that plaintiff's intestate acquired an interest thereunder. This was necessarily the effect of our former decision, although no opinion was written therein expressing the views of the court (87 App. Div. 631). We also necessarily held that the contract sued upon was not tainted with usury. This is clearly so upon principle and is sustained by authority. The contract did not purport to be for the loan or forbearance of the use of money, to which alone usury would apply. The consideration for this contract was a sale of the interest of the parties in the former firm of Fisk, Clarke & Flagg, and by its terms it gave to Henry G. Fisk, as sole surviving partner of said firm, the right to continue and carry on the business without liquidation; take over and appropriate to himself the firm name, its good will, etc., and in consideration of such sale he agreed to pay certain sums, among which was the claim of plaintiff's intestate, together with interest thereon at ten per cent for a specified period of time and six per cent thereafter. The consideration, therefore, for this promise to pay was the sale of this business and the right to continue it in the firm name without liquidation of the partnership affairs. Usury can never be predicated of the consideration paid for the purchase of property. This court so held under the decision above referred to and numerous cases support the doctrine. (*Cutler v. Wright*, 22 N. Y. 472; *Meeker v. Fiero*, 145 id. 165; *Orvis v. Curtiss*, 157 id. 657.) The execution of the contract was not disputed and its breach was established. The plaintiff, therefore,

became entitled to recover if the promise to pay this debt with interest inured to her benefit so as to permit of its enforcement by her administrator.

It appears from the testimony that Mrs. Kennedy did not execute the contract. It was executed upon her behalf by Mrs. Flagg, who was at the time attending to her matters and it was executed pursuant to the advice of their attorney, who was acting for Mrs. Kennedy and Mrs. Flagg, and was accepted by Fisk, the purchaser, as satisfactory to him under the advice of counsel. We are of opinion that the contract inured to the benefit of Mrs. Kennedy and may be enforced by her as one made for her benefit, and that the plaintiff, as her representative, has legal capacity to enforce such right. Mrs. Flagg was the personal representative of her husband, who was formerly a member of the firm of Fisk, Clarke & Flagg. Such firm was liable for the debts which it owed, among which was that of Mrs. Kennedy, and the estate of Flagg, deceased, might in the event of the failure of partnership assets become liable for the whole amount. Mrs. Flagg, therefore, had a direct interest in having this claim paid in order that the interest possessed by her husband in the firm's assets might be relieved from this charge and also that his estate might not become chargeable with its payment. An obligation and duty, therefore, rested upon her to provide for the payment of the claim. The relation which existed between Mrs. Kennedy and Mrs. Flagg was that of mother and daughter, and Mrs. Flagg is the sole heir at law and next of kin of her mother. It was the contract which provided for the payment of the debt; therefore, it was for the direct pecuniary interest and advantage of Mrs. Flagg, both as related to the liabilities of her deceased husband and of her interest in the estate of her mother and the natural obligation which she was under to her. The relation which existed was, I think, sufficient to support the contract to pay the debt of Mrs. Kennedy and also her right to enforce it. (*Todd v. Weber*, 95 N. Y. 181; *Buchanan v. Tilden*, 158 id. 109.) It was to the direct pecuniary benefit of Mrs. Kennedy to secure payment of her debt. The consideration which moved from her daughter to the surviving member of the firm affected in a marked degree the security for the payment of her claim. She had a direct personal interest therein and in the property of the firm, as it was the source of security for

the discharge of her obligation. The promise to pay was, therefore, for her benefit and she may enforce it within the rule of *Lawrence v. Fox* (20 N. Y. 268). The doctrine of this case has never been distinguished or modified in its application, to a degree which at all militates against it as an authority in support of the right of the plaintiff to maintain this action. On the contrary, such right has been asserted in principle in many cases. (*Van Schaick v. Third Ave. R. R. Co.*, 38 N. Y. 346; *Coster v. Mayor*, 43 id. 399; *Rector, etc., v. Teed*, 120 id. 583.) There was no agreement for the loan or forbearance of money by Mrs. Kennedy at any time. The debt which was due to her was made use of as a consideration for the purchase price of this business, and, as we have already seen, Mrs. Flagg had a direct pecuniary interest in the sale and the consideration paid therefor, and the fact that she insisted that a part of such consideration should be this debt and a given rate of interest does not make the contract usurious, nor does it possess under such circumstances a single element of that vice. We reach the conclusion, therefore, that the plaintiff has standing to enforce this contract for the benefit of the estate which she represents.

Nor was the failure to show that there were no outstanding creditors of the firm of Fisk, Clarke & Flagg remaining unpaid at the time of the commencement of the action an answer thereto. The defendants were in no position to take advantage of such fact, if it be admitted to exist. They had repudiated the contract as void, and refused to recognize it as a subsisting liability which they were bound to discharge; consequently, they cannot repudiate the contract and then take advantage of a clause they might have insisted upon had they fulfilled its terms. The court is not now concerned with the rights of creditors as against the claim here asserted. The debt and its amount was established to exist from the ledger of the firm, independent of its recognition in the contract, and the offer of all of the books of the firm in evidence by the defendants was, therefore, properly excluded. No item was pointed out in the offer which showed that it had any bearing upon the amount, or which would contradict the ledger account; nor was it otherwise pointed out wherein, or how, any items contained therein would tend to defeat plaintiff's claim.

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We think the court was, therefore, right in directing a verdict for the full amount of the claim.

The judgment entered thereon should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

WALTER M. JERMYN, Respondent, v. WILLIAM C. HUNTER,
Appellant.

Installation in a building of heating apparatus purchased by a contractor under a contract of conditional sale — when, as against the vendor of the heating apparatus, the title thereto passes to a purchaser of the building — damages for depreciation in the value of the heating apparatus — evidence that the owner intended the fixtures to become a part of the realty.

A firm having a contract with the owners of a building in course of construction to install the heating apparatus therein, purchased a steam boiler, a hot water boiler and a hot water heater under a contract, executed in duplicate, which provided that the title to the property should remain in the vendor until the articles were fully paid for. The boilers and the attendant appurtenances were placed in a boiler room provided for their reception; were bricked in and occupied the space they were intended to occupy as permanent fixtures.

At the time of the sale the vendor knew that the property was to be placed in the building and that the vendees were not the owners thereof. The owners of the building had no notice of the conditional sale and in no wise assented that the title to the heating apparatus should remain in the vendor after its installation in the building.

There was no proof that the owners of the building did not intend to install the boilers and appurtenances as a permanent accession to the realty or assented to their remaining personal property.

After the installation of the boilers and heater, the building was sold upon a mortgage foreclosure sale to a purchaser who had no knowledge of the conditional sale.

Held, that as between the vendor of the boilers and heater and a person who purchased the building at a mortgage foreclosure sale, the title to the boilers and heater passed to such purchaser as a part of the realty;

That even if the vendor of the boilers and heater was entitled to recover possession of them from the purchaser at the foreclosure sale, he could not recover damages for the depreciation in the value of the property, unless such damages were pleaded in the complaint.

The actual annexation of fixtures to the realty with the purpose of using them in connection with such realty, furnishes, in the absence of proof to the contrary, evidence that the owners intended to make the fixtures a permanent accession to the real property.

APPEAL by the defendant, William C. Hunter, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of December, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 6th day of January, 1904, denying the defendant's motion for a new trial made upon the minutes.

Benjamin N. Cardozo, for the appellant.

A. S. Gilbert, for the respondent.

HATCH, J.:

This action was brought to recover possession of a steam boiler, fifty-four inches in diameter by twelve feet in length; one hot water boiler, three feet in diameter by ten feet in length, and one Oswego hot water heater. It was shown upon the trial that the plaintiff sold the articles in question to the firm of Coons & Wilson, who had a contract with the owner for putting in the heating apparatus in a building, then under process of construction, located on the north side of One Hundred and Twenty-fourth street, just east of Broadway, in the city of New York. The contract of sale was executed in duplicate, and provided that the title to the property should remain in the vendor until the articles were fully paid for. It was known to the plaintiff at the time of the execution of these contracts that the property was to be placed in this building and that the vendees were not the owners thereof. The steam boiler was placed in the airshaft upon a foundation constructed for that purpose and was bricked up on both sides, but was not connected with or attached to the walls. It could be removed by tearing away this brick work and taking it out through the court into the street. This would not have required the removal of any part of the main walls of the building, but it would necessitate the removal of a portion of the retaining wall in front of the doors, large enough for working room and a portion of the sidewalk. These retaining walls were not connected with the building itself. The hot water boiler could be taken out by remov-

ing the thickness of one brick on each side of the opening leading out of the cellar and the heater could have been taken out by removing the jambs on each side of the doorway through which it would have to pass. The real property wherein these boilers and the heater were located was sold to the defendant under a judgment of foreclosure and sale under a mortgage and was bid in with the heating apparatus, fully installed, and with no knowledge upon the part of the purchaser of the conditional sale or that the plaintiff had any claims upon the property here sought to be replevied. No motion was made by the defendant for a dismissal of the complaint at the close of the plaintiff's case, but at the close of the entire case the defendant moved for the direction of a verdict in his favor upon the ground, among others, that the articles in controversy were fixtures, had become a part of the realty and that title thereto could not be claimed by the plaintiff as against a purchaser for value and in good faith. This motion the court denied and submitted the question of fact to the jury as to whether the property in question had become fixtures and the jury found a verdict in favor of the plaintiff for the return of the property and for damages in the sum of \$760.32, being the difference in value of the property when installed and the value of the property at the time of the trial. From the judgment entered upon such verdict and from the order denying the defendant's motion for a new trial this appeal is taken.

By undisputed evidence we think that it is established that the property sought to be recovered was at the time of the commencement of this action real property. It was procured for the purpose of being placed in the building then in process of erection as a necessary and permanent adjunct to it. Its purpose was to supply the building with heat, which was necessarily essential to the use and occupation of the building, and as much required in its use as was light and access. The boilers and the attendant appurtenances were placed in a boiler room provided for their reception, were bricked in and occupied the space they were intended to occupy as permanent fixtures. There is nothing to show but that the owner of the building intended to install the boilers and appurtenances as a permanent accession to the realty. In the absence of any expression of intention upon his part it follows as a legal con-

clusion from the character of the property, the place provided for its installation and the necessity of the use of the same in connection with the occupation of the building, that the appurtenance was intended to and became a permanent part of the realty as much as the windows, doors and mantels. This condition effected a union of the three requisites which the Court of Appeals has adopted as a rule for determining when the accession to the realty becomes a permanent fixture. There was the actual annexation to the realty. There was purpose to use the fixtures in connection with the realty to which it was attached, and in the absence of proof these two conditions furnish controlling evidence that the owner intended to make them a permanent accession to the real property. The case comes, therefore, within the definition announced in *Potter v. Cromwell* (40 N. Y. 287) and approved in *McRea v. Central National Bank of Troy* (66 id. 489). In the absence of any agreement upon the part of the owner that the articles should remain personal property or of such notice to him as would authorize an inference of his acquiescence in their remaining personal property, they became part of the realty. It is not contended that the owner had any notice of the conditional sale which was effected by the agreement between the plaintiff and Coons & Wilson, or that he in anywise assented to the title to the property remaining in the plaintiff after its installation in the building. The contract with the owner provided for the installation of the heating apparatus for the purpose of permanent use in connection with the building, and of this fact the plaintiff had notice. There was, therefore, nothing in the case upon which to predicate any assent of the owner that the permanent accession to the realty should continue to be and remain personal property. The conditions were such that these annexations to the realty remained, as between mortgagor and mortgagee and vendor and vendee, real property, and there is nothing which appeared in the case which calls for the application of any other rule. We do not overlook the fact that fixtures, annexed to real property in such form that they would pass as real property under a deed may, nevertheless, by agreement between the owner and the person installing the fixtures, or the vendor of the same, continue to remain personal property. Such are the cases of *Ford v. Cobb* (20 N. Y. 344), *Tiff v. Horton*

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(53 id. 377) and other cases cited and relied upon by the respondent. These cases are without application for the reason that here there was no agreement between the vendor and the owner of the property, nor did the owner have any notice of any conditional sale of the articles in question. It has been held, and we think correctly, that the annexation of fixtures to the realty, in such form that they would become a part of the same, under an agreement between the vendee in possession of the property under a contract of purchase and a vendor of the fixtures that they should remain personal property until paid for, does not save them from becoming a part of the realty as to the vendor of the same who subsequently regains possession of the premises after the vendee has defaulted in payment. Mr. Justice McLENNAN of the fourth department in a satisfactory opinion, in which he reviews all of the principal authorities relied upon by the respondent, conclusively establishes the soundness of such rule. (*Andrews v. Powers*, 66 App. Div. 216.) This case is much stronger for the defendant, for here the agreement was not made with the owner of the property or with any person having authority to bind the owner. This contract was made between the vendor of the articles and the contractor, with whom the owner had contracted to install the property in his building as a necessary and essential adjunct to its beneficial use and enjoyment. It is clear to our minds that the doctrine which makes permanent fixtures personal property as between the owner and the vendor of the same until such time as they are paid for, ought not to be permitted to find application as between a vendor of the chattel and a contractor with the owner, who has agreed to erect for such owner a building. It is evident that if such rule should be upheld the owner of a building would be placed in a very precarious position. He might fulfill his contract to the letter and pay his contractor for every article which went into the building, and having fully paid therefor find that he did not own it and be compelled either to pay again or submit to a dismantling of the entire structure, and in addition be mulcted in damages. Under such a rule it is quite possible to work all of this mischief, and this without notice to the owner or knowledge upon his part in any form of the existence of such a contract. A bare statement of the results which might flow from such a holding makes manifest its impropriety. If vendors of personal

property seek to make a conditional sale they should be required to deal with the owner of the property, and not alone with the contractor without notice to the owner. Unless they do, there is no justification for imposing an incumbrance upon the building, without the owner's knowledge or consent. The Lien Law of the State (Laws of 1897, chap. 418, art. 1, as amd.) furnishes adequate protection for vendors of chattels which enter into the construction of realty. These rights and remedies have been adopted for the protection of vendor, contractor and owner, and should be held sufficient in remedy. An attempt to make application of the doctrine which obtains between a vendor and owner may easily lead to the perpetration of a gross wrong upon the owner and the incongruity is so apparent as to call for its instant rejection. The sale of the property at the foreclosure carried with it the title to these fixtures, and the defendant as purchaser at the sale acquired good title. It necessarily follows that no cause of action was established in favor of the plaintiff, and the motion to direct a verdict in favor of the defendant made at the close of the case should have been granted.

We are also of opinion that it was error to permit the plaintiff to recover damages for the depreciation in value of the boilers, as such damages were not pleaded in the complaint. It is not necessary that we set out our reasons therefor, as upon the main question we think there can be no recovery.

It follows that the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

**GEORGE C. RANKIN, as Receiver of the ELMIRA NATIONAL BANK,
Respondent, v. JOHN J. BUSH and Others, Appellants.**

Principal and agent—power of the agent when acting in his own interest to bind his principal—action upon the bond of a bank cashier who fraudulently certified a check which he used in payment of an individual debt—when a demurrer to the complaint is not frivolous—special damages.

The general power or authority of an agent to act for his principal does not embrace a case where it appears from the transaction that the agent is acting in his own interest. Under such circumstances, the agent's authority to bind the principal by his act will not be upheld, unless it appears that he was clothed with such authority by language so plain that no other rational interpretation can be placed upon it.

The complaint in an action brought by the receiver of the Elmira National Bank to recover upon a bond given by one Bush as security for the faithful performance of his duties as cashier of the Elmira National Bank alleged that Bush was indebted in the sum of \$15,012.50 to the Chase National Bank of the city of New York, with which bank the Elmira National Bank had a deposit account; that Bush drew a check on the Elmira National Bank payable to the order of the Chase National Bank for the amount of his indebtedness to the latter bank and fraudulently and illegally certified such check in his capacity as cashier; that the Chase National Bank charged the account of the Elmira National Bank with the amount of the check, but subsequently returned \$7,012.50 thereof. Judgment was demanded for the remaining \$8,000 with interest thereon.

Upon an appeal from an order adjudging a demurrer interposed by the defendants to be frivolous, it was

Held, that at the time the Chase National Bank charged the account of the Elmira National Bank with the amount of the illegally certified check, it had notice of facts which placed it upon inquiry with respect to Bush's authority to certify the check and that, when it assumed to devote the funds of the Elmira National Bank to the payment of the check, it did so at its peril;

That the transaction did not divest the Elmira National Bank of its title to the money on deposit with the Chase National Bank or impair its right to draw upon such money;

That the plaintiff could not recover the damages, if any, which the Elmira National Bank had sustained on account of the refusal of the Chase National Bank to pay over, upon demand, the money withheld by the latter bank, as such damages were special in their nature and had not been pleaded;

That, as it did not appear that the Elmira National Bank had suffered any loss through the action of Bush or of the Chase National Bank, it was questionable whether the complaint was not demurrable;

That a pleading will not be adjudged frivolous unless its insufficiency is apparent from a mere inspection thereof. If argument is required to establish its insufficiency, it is not frivolous;

That it was, therefore, improper to adjudge the demurrer frivolous.

APPEAL by the defendants, John J. Bush and others, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 3d day of March, 1904, overruling the defendants' demurrer to the plaintiff's complaint, and directing judgment to be entered in favor of the plaintiff upon the ground that such demurrer was frivolous.

Judson A. Gibson, for the appellants.

Edward B. Whitney, for the respondent.

HATCH, J.:

This action was brought upon a bond given by John J. Bush, as principal, and the other defendants, as sureties, conditioned for the faithful performance by said Bush of his duties as cashier of the Elmira National Bank. The complaint, after making formal allegations of the incorporation of the Elmira National Bank, its insolvency and the appointment of the plaintiff as receiver, avers that the defendant John J. Bush was elected cashier of said bank and that he gave a bond, conditioned for the faithful performance of his duties, executed by said Bush as principal and the other defendants as sureties; that thereafter Bush had a deposit account with the bank until it suspended business and the bank had a deposit account with the Chase National Bank of the city of New York, where it deposited large amounts and drew against them; that on or about the 14th day of February, 1891, Bush gave to the Chase National Bank his promissory note for \$25,000, and on the 5th day of May, 1893, he was indebted thereon to the Chase National Bank in the sum of \$15,000 principal, and \$12.50 interest; that on said 5th day of May, 1893, at the office of the Chase National Bank in the city of New York, Bush signed a check, of which the following is a copy, to wit:

“NEW YORK, May 5, 1893.

“ELMIRA NATIONAL BANK, ELMIRA, N. Y.

“Pay to the order of the Chase National Bank, Fifteen Thousand twelve and 50/100 Dollars \$15,012.50 to....

“(Signed) J. J. BUSH.”

At the same time he signed the following statement written across the face of said check, to wit:

"Certified and accepted May 5, 1893.

"Payable at Chase National Bank, New York.

"ELMIRA NATIONAL BANK, by J. J. BUSH, *Cashier.*"

That thereupon Bush delivered the check to the Chase National Bank in payment of his indebtedness as aforesaid, the check was accepted by the bank as such payment, the amount thereof charged to the Elmira National Bank and the charge against Bush upon the books of the Chase National Bank was canceled, and the sum of \$15,012.50 was thereupon withdrawn from the deposit which the Elmira National Bank had with the Chase National Bank; that upon the 5th day of May, 1893, the account of Bush in the Elmira National Bank was overdrawn and he was without authority to certify the check as aforesaid, and that said certification was also illegal by reason of the statutes of the United States. (See U. S. R. S. § 5208; 22 U. S. Stat. at Large, 166, § 13.) The complaint further averred that the books of the Elmira National Bank were kept under the direction of Bush and that no record was ever made on such books concerning the transaction of the said check of \$15,012.50; that the said false certification was discovered by the receiver within six months after said May 5, 1893. The complaint further avers that no part of said sum of \$15,012.50 has been returned to the Elmira National Bank by the Chase National Bank, except the sum of \$7,012.50, which was returned to the plaintiff herein, and that by reason of the dishonest, unfaithful, fraudulent and criminal act of said Bush aforesaid, the Elmira National Bank is damaged in the sum of \$8,000, with interest thereon from said date. Then follows a demand for judgment. To this complaint the defendants demurred upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, and from the order overruling the demurrer and ordering judgment upon the pleadings this appeal is taken.

We are of opinion that the demurrer was not frivolous. An order declaring a pleading frivolous can only be justified where the frivolousness appears from a mere inspection of the pleading and, therefore, justifies the inference that it was interposed in bad faith.

If argument be required to show that the demurrer is bad, then it is not frivolous. (*Youngs v. Kent*, 46 N. Y. 672.) As applied to this pleading we may with propriety use the language of Judge FINCH in disposing of a similar question: "In this case the argument has not even satisfied us that the demurrer was not good." (*Cook v. Warren*, 88 N. Y. 37.) It is apparent from the averments of the complaint that the Chase National Bank was a debtor to the Elmira National Bank at the time when Bush drew and certified the check. The act of Bush was illegal and void, and the Chase National Bank was not authorized to act thereon and charge the check to the Elmira bank and deduct the amount thereof from the amount of the deposit in its favor with the Chase National Bank. (*Gale v. Chase National Bank*, 104 Fed. Rep. 214; *Bank of New York N. B. Assn. v. A. D. & T. Co.*, 143 N. Y. 559; *Pope v. Bank of Albion*, 57 id. 126.)

The last-mentioned bank had notice that the check drawn and certified by Bush was so drawn and certified for the purpose of discharging a debt held by the bank against Bush. The bank, therefore, was chargeable with notice of all the facts and was bound to challenge the authority of Bush to make the check and certification in question before it could safely act thereon. It is a well-settled rule that the general power or authority given to an agent to act for his principal does not embrace a case where it appears from the transaction that the agent is a party acting upon the other side.

Under such circumstances authority to act will not be upheld unless it appears that the agent was clothed with such power and the language conferring it must be so plainly expressed that no other rational interpretation can be placed upon it. (*Bank of New York N. B. Assn. v. A. D. & T. Co., supra*; *Clarke National Bank v. Bank of Albion*, 52 Barb. 592; *Jacoby & Co. v. Payson*, 85 Hun, 367; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5.) The act of Bush was void and illegal, the Chase National Bank had notice of facts which put it upon inquiry, and when it assumed to give force and effect to the transaction by the transfer of the money it did so at its peril. The Elmira National Bank was not divested of its funds by virtue of this transaction; nor was its title to the money defeated thereby. Its right to draw upon the fund was not impaired in the slightest degree. It lost nothing by the transaction and could

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not lose, unless, having knowledge, it ratified the transaction. This it has never done, but has at all times insisted upon its legal rights.

The argument in favor of the demurrer is to the effect that as the Elmira bank was not deprived of any right or title which it has in its deposit with the Chase National Bank, therefore it sustained no damage by reason of the act of Bush or of the Chase National Bank. There is great force in this suggestion, and we are unable to see how the Elmira bank could suffer loss through the void act of Bush, and so long as title to its moneys was not transferred or impaired it lost nothing on account of the transaction. It is said that the Chase National Bank withheld the moneys and refused to pay over the same upon demand by the Elmira bank and that by reason of such act the Elmira bank sustained damage. There is no averment in this pleading which shows any such element of damage. If the Elmira bank suffered any damage on account of the wrongful refusal to pay over the money on demand, it was in its nature special and would be required to be pleaded in order to be recovered. The wrongful refusal of the Chase National Bank to pay did not change title to the moneys, nor did it in the slightest degree affect the title or impair existing remedies to enforce the rights held by the Elmira bank. It is evident, therefore, that the demurrer interposed has raised not only an arguable question, but also one which seriously challenges the sufficiency of this complaint.

There are other questions presented by this record, but we do not feel called upon to consider them. The rule in this department is settled by a long series of decisions that a pleading will not be regarded as frivolous unless its insufficiency is apparent upon a bare statement without argument, and when the trial courts disregard this rule and adjudge a pleading frivolous, this court has felt constrained to reverse the holding. (*Manne v. Carlson*, 49 App. Div. 276; *Bedlow v. Stillwell*, 45 id. 557; *Dancel v. Goodyear Shoe Machinery Co.*, 67 id. 498; *Vlasto v. Varelopoulos*, 73 id. 145.) No doubt was thrown upon these decisions in *Oakes v. Oakes* (55 App. Div. 576). There the question was waived and, in supporting the judgment entered upon the order in that case the court expressly stated that the decision was not to be construed in any sense as a departure from the ordinary rule which obtains when the question is fairly presented.

The order in this case is plainly wrong. It should, therefore, be reversed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements.

In the Matter of the Judicial Settlement of the Account of CHESTER IRVING FISHER, as Executor, etc., of HERMAN C. FISHER, Deceased, Appellant.

H. CLARENCE FISHER, Respondent.

Will — bequest of securities to be divided among the legatees in definite proportions — the executor is entitled to commissions thereon — the securities must bear their proportionate share of such commissions — an executor is not entitled to commissions on a specific legacy.

Where a testator, by his will, bequeaths the contents of a safe deposit box, which consist of stocks, bonds, mortgages and life insurance policies, to eleven persons, in the proportion of one-twelfth to ten of such persons and the remaining two-twelfths to the other one of such persons, and the value of the respective securities is unequal, thus making it impossible to divide them into twelfths for the purpose of delivery to the respective legatees, the bequest is a general legacy and not a specific legacy and the executor is entitled to commissions for the services rendered by him in selling the securities and distributing the proceeds.

Such commissions should not be charged upon the residuary estate alone, but should be borne proportionately by the securities included in the bequest.

An executor is not entitled to commissions for making delivery of the subject of a specific bequest to the legatee.

APPEAL by the petitioner, Chester Irving Fisher, as executor, etc., of Herman C. Fisher, deceased, from so much of a decree of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 20th day of August, 1903, settling the accounts of the petitioner, as fixes the amount of his commissions as executor, etc., of Herman C. Fisher, deceased.

Isaac L. Miller, for the appellant.

Charles J. Breck, for the respondent.

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HATCH, J.:

The surrogate disallowed commissions to the executor on the principal and income received upon the securities bequeathed by the testator under the 2d paragraph of his will, which reads as follows, to wit :

"Second. I give and bequeath the contents that shall be in my box in the Safe Deposit Company of New York, now situated at 146 Broadway, New York, corner of Liberty street, in said city, at the time of my decease, to the following named persons and in the following proportions, viz.: Two-twelfths thereof to Mary Jane Clarke, sister of my late wife, Eliza McKie Fisher; one-twelfth thereof to each of the daughters of said Mary Jane Clarke, viz., Mrs. Nellie Keys and Mrs. Fannie Merrifield; one-twelfth part thereof to each of the daughters of the late Margaret Ann Young, viz., Mrs. Edith Young Shaw, Mrs. Susan Young Cochran, Mrs. Helen Young Maxwell, Mrs. Margaret Young Dutcher, Josephine Young, Grace Young, Mabel Young and Elsie Young."

The articles contained in the box mentioned consisted of shares of stock in various corporations, bonds and mortgages upon property located in the States of Nebraska and Missouri, railroad bonds in various portions of the United States, corporate bonds, many of which were upon property located in the city of New York, and life insurance policies upon the life of deceased of the face value of \$3,000, but which subsequently sold for \$4,362.48. This personal property, together with a few articles of household furniture, which was directed to be divided among the same persons, was appraised at \$101,058.23, and was sold by the executor for \$103,370.08, and the amount received from this sale he divided among the various legatees as directed by the terms of the will. The residuary estate was given to the testator's son, and he contends that the executor has no right to consider the amount received from the sale of the personal property above described as a part of the general estate; that those were specific legacies and that the executor is not entitled to a commission thereon. The executor, on the other hand, contended that he could make no equitable division of this property without converting the same into cash, and that, therefore, he should be entitled to commissions upon the same. The Surrogate's Court held that the property bequeathed in the 2d

clause of the will was all specific bequests and that the executor was entitled to no commissions thereon. From the decree so entered this appeal is taken.

It may be conceded that if this provision of the will be construed as making specific bequests, the executor is not entitled to commissions for making delivery of the specific thing bequeathed. (*Schenck v. Dart*, 22 N. Y. 420.) Nor would this rule be changed even though the legatees by agreement among themselves directed the executor to sell the same and divide the proceeds. It might be that under such circumstances the executor could exact and enforce compensation for his services against the legatees, but his act in making sale of property specifically bequeathed and distributing the proceeds would not create any right to commissions or make the estate liable for his services. (*Collier v. Munn*, 41 N. Y. 143.) The executor's right to commissions upon this portion of the estate must, therefore, depend upon the nature of the bequest. In *Crawford v. McCarthy* (159 N. Y. 514) the Court of Appeals, through Judge HAIGHT, defined the several classes of legacies in this language: "A general legacy is a gift of personal property by a last will and testament, not amounting to a bequest of a particular thing or money, or of a particular fund designated from all others of the same kind. A specific legacy is a bequest of a specified part of a testator's personal estate distinguished from all others of the same kind. A demonstrative legacy is a bequest of a certain sum of money, stock or the like, payable out of a particular fund or security. For example, the bequest to an individual of the sum of \$1,500 is a general legacy. A bequest to an individual of the proceeds of a bond and mortgage, particularly describing it, is a specific legacy. A bequest of the sum of \$1,500, payable out of the proceeds of a specified bond and mortgage, is a demonstrative legacy. A demonstrative legacy partakes of the nature of a general legacy by bequeathing a specified amount and also of the nature of a specific legacy by pointing out the fund from which the payment is to be made; but differs from a specific legacy in the particular that if the fund pointed out for the payment of the legacy fails, resort may be had to the general assets of the estate." By the terms of the clause of the will, above quoted, the property in the box is required to be divided into twelfths, two shares to go to one person, and one to each of the

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other persons named therein. The securities which were found in the box were unequal in value. No particular security was bequeathed to a particular person. Each took a twelfth share in the whole and it is evident that no one of the legatees could have been compelled to take a particular part of the property as his share. There was, therefore, impossibility of distribution of the specific property into twelfths for the purposes of delivery to the respective legatees. The bequest is specific as to the property bequeathed, but it was not specific as to the particular property to be delivered to a particular legatee, nor could it be made such by any division into twelfths, which the will commanded should be done. The bequest partakes more nearly of a general and also of a demonstrative legacy than of a specific legacy. The interest bequeathed is certain and specific, but the necessity of the case required it to be paid from particular property not separated into parts or bequeathed as such. The intention of the testator is clear to give two-twelfths of the property to one person and the remaining ten-twelfths to the others. As the nature of the property bequeathed and the character of the bequest required its conversion into money before the distribution could be made, it certainly does not answer the definition of a specific legacy. In the fulfillment of this provision of the will the executor was required to make distribution in accordance with its terms, as well as of the property bequeathed in the other clauses of the will. When, for the purpose of carrying out the terms of the will, he was required to make sale of the property in order to make distribution of the specified amounts to which each legatee was entitled, he was performing an executorial function of precisely the same character as he was called upon to perform in making distribution under the residuary clause, and we have no doubt that had the executor refused to make sale of this property and distribute the proceeds as required, he could have been compelled to perform the same, as it became a duty imposed upon him when he qualified as executor under the will. An act which the executor could be compelled to perform must be an executorial act and in the performance of it he becomes entitled to be paid commissions. The testator must be presumed to have known the nature and character of the securities which were in the box and must also have known that they could not be specifically distributed in twelfths, as they were in their nature

unequal in value; consequently we do not see how an intent can be imputed to make a legacy specific of particular property when in the nature of things it was impossible to be delivered as such, and in order to give to the legatee the interest which was bequeathed a conversion of the property into money became necessary. These views lead us to the conclusion that the legacy was general in its character and that in carrying out the terms of the will the executor was required to sell the property and make distribution of the proceeds as money interests. It does not follow, however, from this view that the commissions are to be paid from the residuary estate alone. The property bequeathed by this provision of the will is required to bear its proportion of the commissions incurred in administering the entire estate.

It follows that the decree of the surrogate should be reversed, with costs to the executor payable out of the estate, and the accounts of the executor should be settled by an added allowance to him of commissions upon the property bequeathed by the 2d clause of the will.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and LAUGHLIN, JJ., concurred.

Decree reversed, with costs to executor payable out of the estate, and accounts of executor settled as stated in opinion.

MARY E. BROWN, Respondent, v. PATRICK DOHERTY and JOHN DOHERTY, Appellants.

A deed executed by one of two executors having a power of sale is void — when a party claiming under such a deed acquires a good title under the Statute of Limitations — an estate for life in a beneficiary entitled to the possession, distinguished.

Where a will confers on the two executors nominated therein power to sell the testator's real estate, a deed of such real estate executed by but one of the two executors is void if both the executors have qualified and are acting.

The 5th clause of the will of a testator provided: "I give and bequeath unto my executors to be hereinafter appointed, the rest, residue and remainder of my personal and real estate, in trust, nevertheless, and I do hereby by this my last will and testament, authorize my executors hereinafter appointed to rent,

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sell or dispose of the rest, residue and remainder of my said real estate, either at public or private sale as they may deem most advantageous to my estate and to execute good and sufficient deed or deeds for the same and to place the residue of the money after paying my just debts as hereinbefore directed arising from such sale or sales, at interest and to pay to my said wife so long as she shall remain my widow, such income arising therefrom for the support and maintenance of my said infant children, during their minority or infancy.

"And after the said Margaret Dougherty shall cease to be my widow, I give and bequeath to my said children Patrick Dougherty, John Dougherty and James Dougherty, equal, share and share alike, all the estate, both real and personal, that may remain in the hands of the said executors at the time the said Margaret Dougherty shall cease to be my widow.

"And I do also authorize and direct my said executors in case of the sale of my real estate, as already provided for, to sign, seal, execute and deliver good and sufficient deed or deeds of conveyance in the law for conveying the said real estate to the purchaser or purchasers thereof."

In 1878 real estate, included within the residuary clause, was sold at a public auction sale pursuant to advertisements published in the names of both of the executors nominated in the will. One of the executors refused to join in the deed to the purchaser, and such purchaser went into possession of the premises under a deed executed by the other executor.

The testator's widow died in January, 1888, and his youngest child became of age December 21, 1889. In 1902 a grantee of the purchaser at the sale brought an action against the testator's surviving children to determine their claim to the property. The plaintiff and her grantor had held the premises adversely since the execution of the deed.

Held, that, assuming that the deed executed to the plaintiff's grantor was insufficient to convey the legal title to the premises, the plaintiff and her grantor had held the premises adversely for a period during which the Statute of Limitations had run against any action which the executors as trustees or the defendants could bring to obtain possession of the premises, and had, therefore, acquired a good title to the premises;

That the Statute of Limitations against an action by the executors as trustees to recover possession of the premises commenced running at the time the deed was executed;

That if, as seemed quite clear, the executors, during the continuance of the trust, held the legal title to the premises and represented the defendants, that period should be counted in determining whether the Statute of Limitations had run;

That even if the executors as trustees were not entitled to the possession of the premises, the defendants, the testator's surviving children, were at liberty to maintain an action of ejectment in their own behalf when possession was taken under the deed.

The case in which an outstanding life estate or estate held for the benefit of another and where the life beneficiary of the trustee is alone entitled to possession, distinguished.

APPEAL by the defendants, Patrick Doherty and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 8th day of June, 1903, upon the report of a referee.

George W. Curr, for the appellants.

F. W. Hottenroth, for the respondent.

LAUGHLIN, J.:

This action was brought March 9, 1902, to determine the claim of the defendants to real property described in the complaint. The premises are situate in the county of Westchester and were owned in fee simple absolute by Thomas Doherty who died seized and possessed thereof on the 3d day of December, 1874, leaving a last will and testament upon which letters testamentary were duly issued to Hugh Lunny and Patrick Doherty on the 17th day of March, 1875. The 5th clause of the will, the construction of which is to some extent involved in this litigation, was as follows:

"I give and bequeath unto my executors to be hereinafter appointed, the rest, residue and remainder of my personal and real estate, in trust, nevertheless, and I do hereby by this my last will and testament, authorize my executors hereinafter appointed to rent, sell or dispose of the rest, residue and remainder of my said real estate, either at public or private sale as they may deem most advantageous to my estate and to execute good and sufficient deed or deeds for the same and to place the residue of the money after paying my just debts as hereinbefore directed arising from such sale or sales, at interest and to pay to my said wife so long as she shall remain my widow, such income arising therefrom for the support and maintenance of my said infant children, during their minorship or infancy.

"And after the said Margaret Dougherty shall cease to be my widow, I give and bequeath to my said children Patrick Dougherty, John Dougherty and James Dougherty, equal, share and share alike, all the estate, both real and personal, that may remain in the hands of the said executors at the time the said Margaret Dougherty shall cease to be my widow.

"And I do also authorize and direct my said executors in case of

the sale of my real estate, as already provided for, to sign, seal, execute and deliver good and sufficient deed or deeds of conveyance in the law for conveying the said real estate to the purchaser or purchasers thereof."

The premises in question fell within the residue of the estate disposed of by the 5th clause of the will. The plaintiff claims title under a sale by the executors. The defendants are the sole surviving issue of the testator and they claim title under the will upon the theory that there was no sale by the executors and that the trust was terminated by the death of the widow on the 24th day of January, 1888. A sale of the premises at public auction was advertised in the *Empire State Journal* of White Plains in the name of both executors once a week for four consecutive weeks and by handbills conspicuously posted throughout the village of Westchester to take place at an hour and place specified on the 1st day of August, 1878. At the time and place specified a public sale was conducted by a licensed auctioneer in the presence of both executors and the property was struck off to one Kedney on his bid of \$400 and he paid ten per cent of the purchase price pursuant to the terms under which the property was offered for sale. Kedney thereafter assigned his bid for a valuable consideration to James P. Brown, the husband of the plaintiff, who on the 5th day of August, 1878, paid the balance of the purchase price to Patrick Doherty, one of the executors, and received a deed from him as executor, dated on that day, which was duly recorded on the day following. The other executor subsequently refused to sign the deed upon the ground that certain claims against the estate had not been settled; but he persisted in his refusal after an offer on the part of Brown to pay the same. The evidence justified a finding of good faith on the part of the executor who executed the deed and on the part of Brown in paying the purchase price and accepting it. The premises consisted of a vacant lot in the town of Westchester, having a frontage of 110 feet on Union avenue and extending in depth on one line 386 feet and on the other 403 feet. At this time the lot was inclosed on the rear and one side, at least, by fences. On one side, however, there was no fence. The lot adjoining the premises on that side was owned by Patrick Doherty, the executor who exe-

cuted the deed and who was the father of the plaintiff. The plaintiff and her husband respectively during the time they respectively held this second title from the executor claimed and exercised exclusively such acts of ownership as might be exercised in view of the condition of the property. The plaintiff shortly after receiving her deed repaired the fences and built a new fence in front and annually paid the taxes. The adjacent lot, between which and the premises in question there was no fence, was also inclosed front, rear and on the opposite side—the two lots forming one entire inclosure. The plaintiff's father never made any claim or exercised any act of ownership over these premises; and in the deed which he gave as executor which recites that it was given pursuant to the will, he gives an individual covenant of quiet enjoyment. Upon the death of her father, the date of which is not shown, the title to the adjacent lot descended to her as his heir.

It appears that the executors never accounted. Executor Lunny died on the 31st day of December, 1890. The other executor is dead but the date of his death is not shown. The defendants were minors at the time of the execution of the deed by the executor and the younger became of age on the 21st day of December, 1889. It does not appear that there was ever any demand on the executors for an accounting or that any of the claims against the estate remained unsatisfied. The inference is, and it seems to have been assumed, that the property was taxed to the plaintiff after she obtained a deed thereof. Of course a deed from one only of two executors or trustees where both have qualified and are acting is void. (*Brennan v. Willson*, 71 N. Y. 502; *Wilder v. Ranney*, 95 id. 7.)

Assuming, without deciding, that the circumstances were not such that it can be said that the executor Lunny in refusing to execute the deed did "neglect or refuse to take upon him the execution" of the will within the intent and meaning of section 55 of title 4 of chapter 6 of part 2 of the Revised Statutes (2 R. S. 109) so as to enable the other executor to convey the legal title, which it is claimed is not free from doubt (*Roseboom v. Mosher*, 2 Den. 61), yet it is clear that as against the executors, acting as trustees, the Statute of Limitations against an action to recover possession of the premises commenced to run at once. (Code

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Civ. Proc. § 415; *Chase v. Cartright*, 53 Ark. 358; *Willson v. Louisville Trust Co.*, 102 Ky. 522; *Ewing v. Shannahan*, 113 Mo. 188; *Meeks v. Olpherts*, 100 U. S. 564. See, also, *Yeoman v. Townshend*, 74 Hun, 625; *Smith v. Hamilton*, 43 App. Div. 17.) It is to be observed that the devise to the executors as trustees was for the benefit not of the widow for whom special provision was made in the 3d clause of the will by giving her a life use of this parcel of real estate, but for the "support and maintenance" of the children. If, as seems quite clear, the trustees during the continuance of the trust held the legal title and represented the defendants, that period should be counted in determining whether the Statute of Limitations has run. (*Chase v. Cartright, supra*; *Willson v. Louisville Trust Co., supra*; *Ewing v. Shannahan, supra*; *Meeks v. Olpherts, supra*.) And such period taken in connection with the time that elapsed after the defendants became of age before this action was commenced makes more than the twenty years required to bar an action by them. But even if this be not so and the trustees were not entitled to possession, then defendants were at liberty to maintain an action of ejectment in their own behalf when the plaintiff took possession claiming title under this deed, and more than twenty years having elapsed since that time and more than ten years having elapsed since they became of age, their right to maintain an action for possession has become barred. (Code Civ. Proc. §§ 365, 375.) The case is distinguishable from those where there is an outstanding life estate or estate held for the benefit of another, and where the life beneficiary of the trustee is alone entitled to possession; in which case the Statute of Limitations does not begin to run against the remainderman until he is entitled to possession. (*Clute v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 267; *Fleming v. Burnham*, 100 id. 1; *Simis v. McElroy*, 160 id. 156; *Jackson v. Mancius*, 2 Wend. 357.)

We think the plaintiff has held the premises adversely under the deed of the executor. The lot was completely inclosed against every one except the plaintiff's father, who makes no claim of title and who was under a personal covenant of quiet enjoyment contained in his deed as executor. In these circumstances the mere fact that the lot was left open on the side toward the premises of the plaintiff's father, which premises themselves were otherwise

completely inclosed, does not, we think, deprive the plaintiff of the benefit of the claim that her premises were "protected by a substantial inclosure." (Code Civ. Proc. §§ 369, 370.) The plaintiff having thus held the premises adversely for the period during which the Statute of Limitations against any action for possession has run, has good title. (*Baker v. Oakwood*, 123 N. Y. 16.)

It follows, therefore, that the judgment should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and HATCH, JJ., concurred.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN SAMPSON, Respondent, v. THE NEW YORK CATHOLIC PROTECTORY, Appellant.

Habeas corpus to obtain possession of a child held under a commitment — the child's welfare cannot be considered.

Where, on the return to a writ of habeas corpus to inquire into the cause of the detention of the petitioner's infant son, it is undisputed that the respondent's custody of the child is by virtue of a commitment made by a magistrate, the court should remand the child into the respondent's custody.

Such a writ is simply a writ of right and the question of the child's welfare cannot enter into the determination of the court.

APPEAL by the defendant, The New York Catholic Protectory, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of April, 1903, sustaining a writ of habeas corpus theretofore allowed herein upon the petition of one Lizzie Sampson, and awarding the custody of the relator to said petitioner.

Joseph T. Ryan, for the appellant.

Joseph P. Nolan, for the respondent.

VAN BRUNT, P. J.:

One Lizzie Sampson petitioned the court for a writ of habeas corpus alleging that one John Sampson, her son, was restrained of

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his liberty by the defendant, and that he had not been committed or detained by virtue of any judgment, decree, final order or process specified in section 2016 of the Code. The petition further alleges that the prisoner was detained under an agreement between the defendant and the petitioner, whereby the custody of the relator was to be assumed by the defendant for a stated period of time. As a return to the writ of habeas corpus the defendant stated that it held the relator under a commitment by one of the city's magistrates dated October 4, 1895, a copy of which was annexed to the return. There was no traverse to this return; it must, therefore, be accepted as true.

As the writ of habeas corpus is simply a writ of right, the only question brought up is the fact of the commitment. This fact is not disputed, and, consequently, the relator should have been remanded. The allegation in the petition that the relator was held by virtue of an agreement between his mother and the defendant, is negatived by the return which states that he is held by virtue of a commitment.

Our attention is called by the respondent to *Matter of Knowack* (158 N. Y. 482), but it will be observed that that proceeding was initiated by a petition and was addressed to the chancery powers of the court, and the regularity of the proceeding under which the person sought to be released was held was in no way challenged. It was there held that where there has been an interference by the court to protect and care for the child at the public's expense, the chancery powers of the court as to the restraint of the child seem only to be limited by the necessities of the case, having due regard to the welfare of the infant. When a proceeding of this kind is initiated in respect to the relator, then the chancery powers of the court may be called into action, if necessary, for the welfare of the child. But in a habeas corpus proceeding no such considerations can enter into the determination.

The order should, therefore, be reversed and the relator remanded to the custody of the defendant.

PATTERSON, INGRAHAM, HATCH and LAUGHLIN, J.J., concurred.

Order reversed and relator remanded to the custody of the defendant.

JACOB L. HILL, as Trustee in Bankruptcy of SARAH WARSAWSKI, Appellant, v. SARAH WARSAWSKI and LENNA DAVIS, Respondents.

Action to establish that a deed executed by a bankrupt while solvent was in trust for his benefit — there must be a written declaration of the trust — failure of the grantees to allege that there was no written declaration thereof.

A trustee in bankruptcy cannot maintain an action to compel the conveyance to him of certain land which the bankrupt, four years before the adjudication in bankruptcy, while entirely solvent, conveyed to her daughter upon an alleged oral agreement that the beneficial interest in the lands conveyed should remain in the bankrupt, and that she should be entitled to a reconveyance thereof upon demand, unless he is able to produce the written declaration of the trust required by section 207 of the Real Property Law (Laws of 1896, chap. 547).

Where the grantee denies the existence of the alleged trust, it is incumbent upon the trustee to establish the existence of the trust in the manner provided by statute, namely, by a written declaration of trust; the fact that the grantee did not expressly plead that no written declaration of the trust had been executed does not entitle the trustee in bankruptcy to maintain the action upon making proof of the parol agreement.

APPEAL by the plaintiff, Jacob L. Hill, as trustee in bankruptcy of Sarah Warsawski, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 18th day of November, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, dismissing the complaint upon the merits.

Albert H. Gleason, for the appellant.

Nathan D. Stern, for the respondents.

VAN BRUNT, P. J.:

This action was brought by the plaintiff as trustee in bankruptcy of one Sarah Warsawski to compel the conveyance to him of certain lands situate in the borough of Manhattan which the trustee contended were conveyed without consideration by Sarah Warsawski to her daughter Etta upon the explicit agreement that the beneficial interest in the lands remained in the grantor and that she should be entitled to a reconveyance upon demand. These lands were conveyed by Etta to one Lena Davis, another daughter of the bankrupt; and it was claimed by the plaintiff that the conveyance

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was subject to the same terms and that both conveyances were without consideration. The first conveyance above mentioned was made on the 6th of January, 1898, and the second on the 10th of March, 1898, and the defendant Sarah Warsawski was declared a bankrupt on the 21st of May, 1902. The plaintiff claims relief solely upon the ground that the defendant Lena Davis held the property in question in trust for the defendant Sarah Warsawski. Upon the opening of the case the counsel for the plaintiff stated that he expected to prove a declaration of trust by parol and that there was no writing of any kind signed by the party declaring the trust. There was no claim or allegation that at the time of this conveyance the defendant Sarah Warsawski was not entirely solvent. Objection being taken to this course of proof, the court dismissed the complaint, to which counsel for the plaintiff took exception, and from the judgment thereupon entered this appeal is taken.

Section 207 of the Real Property Law (Laws of 1896, chap. 547) provides that "any trust or power over or concerning real property * * * cannot be created, granted, assigned, surrendered or declared unless * * * by a deed or conveyance in writing subscribed by the person creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing." This provision of the statute clearly prescribes that every conveyance of an interest in real property in trust must be by deed in writing. There is an exception in the section, however, which provides that the section shall not prevent any declaration of trust from being proved by a writing subscribed by the person declaring the same. And it has been held that such a trust may be established by any writing from which its terms can be spelled out, and which is subscribed by the party who, it is claimed, has declared the trust.

Now in the case at bar there was no attempt to prove a declaration of trust by any writing whatever. In fact, it was stated by the counsel that it was to be proved by parol; and he claimed to do this under the pleadings, because the statute was not set up in favor of the defendant Lena Davis. There was a general denial, and there was an allegation that the defendant Sarah Warsawski had never made any such declaration in writing; but there was none in respect to the defendant Lena Davis.

But we think that the decisions in reference to the necessity of a

defendant pleading the Statute of Frauds in order to avail himself of its benefits have no application to the case at bar. In the Statute of Frauds the provision is that in the cases specified every agreement shall be void unless such agreement or some note or memorandum thereof be in writing and be subscribed by the party to be charged therewith. But in the case at bar the language of the provision is entirely different. It provides that no trust or power over or concerning real property can be created unless by deed or conveyance in writing. And then comes in the exception that a party holding property may make a declaration of trust by any writing subscribed by such party. Therefore, in order to show that this trust has been created, it is necessary to prove the deed, as there is no other way in which such an estate can be created under the statute; and where a conveyance is made with an agreement that the property shall be held in trust, that declaration of trust may be proved by a writing subscribed by the party declaring the same. There can be no trust estate whatever created without a writing; and, consequently, where there is a denial of the trust, it is necessary to establish it in the way provided by the statute.

The judgment should be affirmed, with costs.

PATTERSON, O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

PATRICK W. CULLINAN, as State Commissioner of Excise of the State of New York, Appellant, *v.* ERNEST RORPHURO and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Respondents.

Action upon a bond given to procure a liquor tax certificate — a verdict in favor of the defendants will be set aside where it is opposed to the uncontradicted testimony of excise agents — status of such agents as witnesses.

Where, on the trial of an action brought by the State Commissioner of Excise to recover the penalty of a bond given in connection with a liquor tax certificate, two excise agents in the employ of the excise department testify positively that the holder of the liquor tax certificate sold liquor to them at prohibited times, and such testimony is unimpeached and in reality uncontradicted, a verdict rendered in favor of the defendants should be set aside as against the weight of evidence.

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Excise agents are not to be ranged in the same category of witnesses as persons hired to procure evidence, or even as detectives.

VAN BRUNT, P. J., and O'BRIEN, J., dissented.

APPEAL by the plaintiff, Patrick W. Cullinan, as State Commissioner of Excise of the State of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 13th day of May, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 29th day of April, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

Herbert H. Kellogg, for the appellant.

Abraham Gruber, for the respondents.

PATTERSON, J.:

This action was brought on a bond given under section 18 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), and to recover for the breach of its condition. At the trial the defendants had a verdict, and from the judgment entered thereon and from an order denying a motion for a new trial the plaintiff has appealed.

It was proven on the trial that in August and September, 1900, the defendant Ernest Rorphuro was the proprietor of premises Nos. 2835, 2837 and 2839 Broadway in the borough of Manhattan in the city of New York, upon which liquor was sold. He was the holder of a liquor tax certificate, issued pursuant to the Liquor Tax Law. Upon his application for the certificate he had furnished a bond executed by himself and the defendant the Fidelity and Casualty Company. The condition of the bond was that Rorphuro, the principal, would not "suffer or permit any gambling to be done in the place designated by the Liquor Tax Certificate in which the traffic in liquors is to be carried on, or in any yard, booth, garden or any other place appertaining thereto or connected therewith, or suffer or permit such premises to become disorderly, and will not violate any of the provisions of the Liquor Tax Law, or any act amendatory thereof or supplementary thereto."

The plaintiff places his right to recover upon alleged breaches of the condition of the bond, claiming, among other things, *first*, that upon Sunday, August 12, 1900, Rorphuro, at the said premises, by

himself, his agents, servants and bartenders, trafficked in liquors by selling them in quantities less than five wine gallons to persons named; and, *second*, charging four violations of the Liquor Tax Law, consisting in the sale of liquor in prohibited quantities to two persons named, at four separate and distinct times, on Sunday, September 9, 1900. The defendants answered separately, but each seeks to avoid the effect of the allegations of the complaint respecting the breaches of the condition of the bond, by setting forth that Rorphuro was the proprietor of a hotel; that the premises named in the complaint were used as a hotel, and that Rorphuro had complied with all the requirements of the Liquor Tax Law, and had the right, at the times mentioned in the complaint, to sell and dispose of liquor on the premises on Sundays to guests frequenting the same, such sales being in connection with meals then and there served such guests and further claiming that if liquors were sold, as alleged in the complaint, the same were furnished and sold in connection with meals then ordered and which the defendant Rorphuro had the legal right to do.

It is not to be questioned that liquor was sold for consumption on the premises to the persons named in the complaint on the specific Sundays mentioned therein. The defendants seek to avail themselves of the right accorded by the Liquor Tax Law to the proprietor of a hotel to sell liquor on the premises to guests who are furnished at the same time with meals, and the plaintiff earnestly insisted on the trial that the burden of proof was upon the defendant Rorphuro to show such a situation of the building in which he carried on his liquor traffic as constituted a full compliance with all the requirements of the Liquor Tax Law as to what is to be regarded as a hotel within the meaning of that law; and that Rorphuro had failed to do so, and, hence, a verdict should have been directed for the plaintiff.

We do not consider it necessary on the present appeal to pass upon the sufficiency of the evidence to show strictly or substantially that Rorphuro's premises may be regarded as a hotel and come within the description and within the definition or requirement of the Liquor Tax Law. We will assume that it is sufficient and that Rorphuro had the right of a hotelkeeper to sell liquor to his guests, if it were shown that he had actually and in good faith supplied to *bona fide* guests

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liquor with their meals on the Sundays referred to, or if there were evidence to authorize a verdict for the defendants upon that subject. There was a conflict as to what happened on the premises on Sunday, August 12, 1900. The state of the record is such that as to that particular day there was an issue for the jury to settle; but as to September 9, 1900, there is no evidence contradictory of that of McPhillips and Fisher as to the sale of liquor to them on each of the four separate times on that day on which they drank liquor on the premises. Even if it may be said that in some general way there was testimony to indicate by a very strained inference that there must have been something furnished to those two men to eat at the times they bought liquor on that day, it is so vague, general and inconclusive that a verdict based upon it should be set aside as being against the weight of positive evidence unimpeached and in reality uncontradicted. The persons to whom liquor was sold on September ninth (McPhillips and Fisher) were excise agents, but they are not to be ranged in the same category of witnesses as persons hired to procure evidence, nor even as detectives. (*Cullinan v. Trolley Club*, 65 App. Div. 202; *People ex rel. Simernyier v. Roosevelt*, 2 id. 498.) Here, the great preponderance of testimony is that on each of the four occasions on which McPhillips and Fisher bought, paid for and drank liquor on the premises of Rorphuro, on September 9, 1900, they not only did not order, did not pay for and did not eat, but they were not served with a meal or with food, although there is some testimony of a circulating sandwich being passed around the room in which they sat. The testimony of McPhillips and Fisher is positive and direct. The testimony relied upon by the defendants to show that on the 9th of September, 1900, McPhillips and Fisher were served with a meal is really valueless. Rorphuro says, speaking generally, that he knew McPhillips, and that he had seen him on the premises; that he was there every Sunday himself, and there were no violations of the Liquor Tax Law; but he said he was not able to tell the day or the month when he saw McPhillips and Fisher on the premises. Leh Meyer, a policeman, swears that he was at the premises every Sunday in July, August and September, 1900; he saw people drinking there and that they always had articles of food in every case—that is, those who were within his sight. He says that on a Sunday, either in July, August

or September — it might have been in August or September, he did not know which — he saw McPhillips and a man with him, and they were drinking. He did not remember what they ordered or what they had, but it was some food ; and then he remembered that he thought it was some roast ham, or something like that. The testimony of Powers, a witness on behalf of the defendants, amounts to nothing, except that he saw McPhillips on the premises once, and that was a Sunday, and that there was something on the table before him which the witness thought was roast ham. The testimony of Brew, another witness for the defendants, seems to relate not to McPhillips and Fisher, but to the men who, it was claimed, were served with liquor on the premises on August 12, 1900.

The judgment and order appealed from should be reversed, and a new trial ordered, with costs to appellant to abide the event.

McLAUGHLIN and LAUGHLIN, JJ., concurred ; VAN BRUNT, P. J., and O'BRIEN, J., dissented.

O'BRIEN, J. (dissenting) :

I dissent. The majority of the court rest their decision upon the weight to be given to the evidence of McPhillips and Fisher as to the sale of liquor to them on September 9, 1900. It is said that the verdict should be set aside because it is against the weight of their positive evidence, "unimpeached" and "uncontradicted." This characterization does not seem to me to be borne out by the facts ; and it is predicated upon the proposition that, because they were excise agents, they "are not to be ranged in the same category of witnesses as persons hired to procure evidence, nor even as detectives."

I am aware that the court has so stated in the two cases referred to in the opinion ; but upon reflection I am not prepared to assent to this view. These men, as the evidence shows, were employed by the State and were actively engaged in an attempt to find the evidence upon which they could break Rorphuro's license ; and their interest and zeal in this direction are abundantly established by this record, because, apart from their former attempts, it appears that on this particular date they endeavored on four separate occasions to tempt Rorphuro, by ordering liquor without a meal, to violate the law. These witnesses do not rely at all upon any violation observed with respect to selling liquor without meals to others on

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that day, but, taking their evidence at its best, they would have the jury believe that they had succeeded, after four attempts, in obtaining liquor on that Sunday without some food being served at the same time. To say that this evidence is to be accepted without question, and is to be characterized as unimpeachable, is going further on the subject of credibility to be given to such evidence than any other authority to which my attention has ever been called. If the case stood upon their uncontradicted evidence, I still think there would be a question for the jury, because the animus of the witnesses, their undoubted interest in the quest which they were making, their manifest desire to obtain the evidence, and the persistency with which they continued upon the four occasions to tempt the waiters to furnish them with liquor without food, left the question of their credibility, it seems to me, one of fact for the jury. We have, however, as against their evidence, that given by the proprietor, the policeman and others on behalf of the owner of the hotel, which contradicts the statements of these two witnesses as to the alleged violations of that law on that day.

Rorphuro, against whom and his bondsman it is endeavored to recover the penalty of the bond because of a breach of its condition, held a hotel license; and he had, therefore, the right, when serving food, to supply guests with drinks. This place of Rorphuro's was a resort patronized by the general public, and principally by persons of moderate means. They are as much entitled to have a drink served with their meals or with food as the patrons of our larger hotels or clubs. The zeal and persistency of these agents in tempting this hotelkeeper on four separate occasions, if their testimony is to be believed, to violate the law, displays a special interest in establishing a violation in this place, and their credibility was properly submitted to the jury.

Therefore, I do not think that the verdict is against the weight of evidence, and there being peculiarly a question of fact for the jury, to be resolved upon their view of the credibility to be attached to the testimony of the respective witnesses, we should not interfere with the verdict, and the judgment accordingly should be affirmed.

VAN BRUNT, P. J., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

**THERESA GOLDSMITH, Respondent, v. LORA C. SCHROEDER,
Appellant.**

Landlord and tenant — power of the lessor's agent to accept a surrender of the demised premises — what lease does not provide for payment of the rent in advance.

An agent of a lessor, who has authority, without consulting with the lessor, to modify the provisions of a lease by reducing the rent reserved therein, has power, for a valid consideration passing from the lessee, to waive a provision in the lease that no surrender of the premises shall be valid unless accepted by the landlord in writing, and to accept such a surrender orally.

If, in reliance upon the agreement with the agent, the lessee pays a month's rent in advance and vacates the premises before the expiration of such month, and the lessor then takes possession of the premises and relets them for a term extending beyond the term of the original lease, the lessee cannot be held responsible for rent accruing after she has vacated the premises, at least where she received no notice from the lessor that the arrangement with the agent will not be carried out.

Where a lease provides for the payment of an annual rent of \$1,500 in equal monthly installments on the first day of each and every month during the term, the monthly payments are for the rent which accrued during the preceding month.

APPEAL by the defendant, Lora C. Schroeder, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 20th day of June, 1903, upon the verdict of a jury, rendered by direction of the court, and also from an order bearing date the 17th day of June, 1903, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

William T. Read, for the appellant.

Nathan Ottinger, for the respondent.

INGRAHAM, J.:

There are two causes of action alleged in the complaint, both based upon a lease by the plaintiff to the defendant of certain premises therein described. A copy of the lease is annexed to the complaint, and by it the plaintiff leased to the defendant an apartment in the house No. 2 West Ninety-fourth street, in the city of New York,

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for the term of one year seven and one-half months, commencing February 15, 1902, and ending October 1, 1903, at an annual rent of \$1,500, payable in equal payments of \$125 on the first day of each and every month. The lease contained a provision by which, "in case of default in any of the covenants, the landlord may resume possession of the premises and relet the same for the remainder of the term at the best rent that she can obtain for account of the tenant, who shall make good any deficiency," and that "no surrender before the expiration of the term demised, of the flat herein leased to said tenant, shall be valid unless accepted by the landlord in writing." By the first cause of action the plaintiff seeks to recover the rent for the months of September, October, November and December, 1902, and for a second cause of action it is alleged that the defendant failed to pay the rent provided for in said agreement, and that by reason of such failure, and on or about the 1st day of January, 1903, the plaintiff, pursuant to the terms, conditions and provisions of said agreement, re-entered the premises therein described and took possession thereof as agent of the defendant, and not otherwise, and rented the said premises for the account of the defendant at the rate of \$1,200 per annum, and the plaintiff seeks to recover the difference between the amount received from the first of January to the first of October and the amount that the defendant agreed to pay for that term. The defendant admits the making of the lease, denies certain of the allegations of the complaint, and alleges as a separate defense that before the rent claimed in the complaint became due the defendant surrendered to the plaintiff the demised premises and all the residue of the unexpired term, and the plaintiff accepted such surrender and took possession of the premises.

The case coming on for trial before the court and a jury, the plaintiff proved that the defendant took possession of the premises prior to the 15th of February, 1902, that she paid rent up to the fifteenth of September, but had not paid anything since; that she vacated the premises in the early part of September, 1902; that the agent of the plaintiff then endeavored to procure a tenant for the premises and succeeded in renting the same for the account of the defendant on the 9th of December, 1902. This lease of the premises was at the rate of \$1,200 a year, from January 1 to October 1, 1903,

and \$1,500 for the year extending from October 1, 1903, to October 1, 1904. The plaintiff having rested, the defendant testified that in the early part of August she had a conversation with Smith, the plaintiff's agent, at which she said that on account of her children she was going to the country and would give up the apartment; that she would pay one month's rent in advance and that would give him an opportunity of renting it; that he took the money, said "all right" or "very well," and gave her a receipt which was introduced in evidence. That receipt was dated August 25, 1902, and was for the rent from August fifteenth to September fifteenth. She further testified that there was nothing else said; that prior to the fifteenth of September she removed her furniture from the apartment, and that no claim or demand was made upon her for the rent from that time until the commencement of the action. Smith testified that his firm had been acting as agent for the plaintiff in relation to the apartment house in question; that he collected rent for the plaintiff and made repairs upon her property; that when he rented an apartment for the plaintiff he sent a lease to the plaintiff for her signature; that his firm managed the property for the plaintiff, that after the lease was executed his firm agreed with the defendant to reduce the rent from \$1,500 to \$1,400 per annum, and wrote a letter to the defendant in which it was stated that "It is understood between us that your actual rent for the 5th flat South at 2 West 94th Street is to be \$1,400 per annum, or \$116.67 per month;" and the witness stated that this phrase in the letter, "It is understood between us" referred to an understanding between his firm and the defendant; that from time to time, without conference with the plaintiff, the witness ordered repairs and modified the terms of the leases of the house, and the witness did not deny the conversation with the defendant to which she testified.

After the defendant rested, the plaintiff's counsel moved to strike out the testimony of the defendant in regard to the conversation with Smith in which he said "very well" to the request that the defendant pay a month in advance and give up the apartment, on the ground that there was no evidence that the agent was authorized to accept any surrender, and also upon the ground that the lease provides that a surrender can only be had by an acceptance on the part of the landlord in writing. That motion was granted, and the

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defendant's counsel excepted. The defendant's counsel then asked to go to the jury on the question as to whether Smith was such general agent of the plaintiff as to be authorized to accept the surrender, and as to whether or not he did actually accept a surrender of the premises. The court denied this motion, the defendant excepted, and the court thereupon directed a verdict for the plaintiff.

Upon this evidence it was competent for the jury to find that these agents had authority from the plaintiff to make leases of the premises, to modify leases when made, or to accept a surrender of the property leased. If they had a right as plaintiff's agents to modify a lease by reducing the rent, they certainly had authority to modify the lease by accepting a surrender of the premises, and a right to modify or waive the written provision in the lease that no surrender would be valid except in writing. The effect of the agent's testimony was that he had authority to modify leases made by him on the part of the plaintiff without consulting with her; and an agreement for a surrender of the premises, based upon a valid consideration, would certainly be no greater modification of the lease than an agreement to reduce the amount of rent \$100 a year, which it was conceded that the agent did on behalf of the plaintiff. It was error, therefore, to strike out the testimony of the defendant as to the agreement with Smith.

We think also that it was upon this evidence a question for the jury as to whether or not there was an actual surrender of the lease and an acceptance by the agent of rent in advance for the month ending September fifteenth as a consideration for this agreement to end the term on that day. If the defendant called upon the agent of the plaintiff in August and said that she would give up the apartment and would pay one month's rent in advance to give him an opportunity of renting it, and if the agent said that was all right and accepted the payment of one month's rent in advance, and the defendant, acting on the agreement, delivered possession of the premises to the plaintiff who, under the agreement, took possession of the premises and, without notice to the defendant that it was for her account, rented them for a term extending beyond the defendant's term, there was evidence to justify a finding that the agent for a valuable consideration had accepted a surrender of the term from

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the fifteenth of September. The consideration for this surrender was the payment of the rent in advance when no rent was due until the first or fifteenth of September, and the delivery of possession of the premises by the defendant. This was in effect a new agreement which modified the lease. It was based upon a valid consideration, and by it the term demised was to end on the 15th of September, 1902, instead of the first of October in the following year; and if the agent had authority to make such an agreement and did in terms make it, I can see no reason why it should not have the effect of terminating the obligation of the defendant to pay the rent for a period after September 15, 1902. If this agreement was made, certainly the defendant could not be held responsible for the rent after the plaintiff had taken possession of the premises, without some notice to her that the understanding would not be carried out. There was no provision in the lease that the rent was payable in advance. The defendant agreed to pay an annual rent of \$1,500 payable in equal monthly payments on the first day of each and every month during the term; but this is not stated to be in advance. The payment was to be made on the first day of each month for the rent that had accrued for the preceding month.

I think, therefore, that upon the testimony there was evidence to justify the jury in finding that Smith was the agent of the plaintiff and had authority to make and modify leases for the premises in question, and that the evidence of the defendant as to the agreement was competent under her defense, and that it was competent for the jury to find that the lease was modified by making it end on the 15th of September, 1902; and if the defendant delivered the possession of the premises to the plaintiff or her agent under the agreement, the liability of the defendant for rent ceased on the 15th of September, 1902, and the plaintiff was not entitled to recover. It follows that it was error to strike out the testimony of the defendant as to her agreement with Smith, and that upon the evidence that was a question for the jury.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN and HATCH, JJ., concurred.

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LAUGHLIN, J. (concurring):

I concur in the result upon the ground that even though the agent, in view of the express provision of the lease regulating the method of surrender, was not authorized to accept a surrender of the premises, yet the landlord having subsequently accepted possession, this constituted a ratification of the terms of surrender which presumably were communicated to him. The subsequent possession of the landlord was obtained through the arrangement made by the tenant with his agents. He could not accept part and repudiate part, at least not without first notifying the tenant and giving her an opportunity to pay the rent. But for the attempted surrender to the agent the landlord could not have obtained possession.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

JOHN D. BARRETO, Respondent, v. VICTOR HENRY ROTHSCHILD,
Appellant.

Action on contract — bill of particulars of the instances wherein the defendant claims that the plaintiff did not comply with the contract.

Where the answer interposed in an action upon a contract denies the plaintiff's allegation of performance, the defendant will not be required to state the particulars of his denial, nor, if he specifies certain instances wherein the plaintiff has failed to comply with the contract, will he be required to furnish the particulars of the instances specified.

APPEAL by the defendant, Victor Henry Rothschild, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of December, 1903, requiring the defendant to serve a bill of particulars.

Abraham Benedict, for the appellant.

Moses R. Rytenberg, for the respondent.

INGRAHAM, J.:

It was stated by the court below in granting this motion, and is conceded by the respondent upon this appeal, that if the defendant

had contented himself with a denial of the plaintiff's allegation of performance, he would not have been required to state the particulars of his denial; but it was held that because, not content with the denial, he specified certain particulars in which the plaintiff had failed to comply with his contract, he should be required to furnish the particulars of the instances specified. To entitle the plaintiff to recover under the contract, he must allege and prove that he performed the contract so far as it called upon him to perform it, and the defendant should not be required to specify his evidence by which he expects to disprove the plaintiff's allegation of performance. For that purpose he will be entitled to use any evidence available, and should not be limited, which would be the effect of requiring him to furnish the particulars asked for.

The order should be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, HATCH and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE F. P. BHUMGARA COMPANY, Respondent, v. JAMES L. WELLS, President, and Others, as Commissioners of Taxes and Assessments, Constituting the Board of Taxes and Assessments of the City of New York, Appellants.

Taxation of corporations—the assessors cannot disregard an unimpeached verified statement filed by the corporation—certiorari to review an assessment—where the return raises an issue of fact, testimony must be taken—what return does not raise an issue of fact.

Where a corporation, assessed for the purposes of taxation by the commissioners of taxes and assessments of the city of New York, applies for a reduction of its assessment and files with the tax commissioners a verified statement showing its financial condition, if the commissioners are not satisfied with such statement, they may require further information from the corporation; if, however, they neglect to do so, they may not disregard the statement simply because they believe, without any other grounds for such belief than their mere surmise, that it is untrue.

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Where an issue of fact is raised by the petition for, and the return to, a writ of certiorari obtained by the corporation to review the action of the commissioners in refusing to reduce the amount of the assessment to the sum shown by the statement, it is the duty of the court to take testimony upon such issue or send the matter to a referee for that purpose.

Where, however, the return denies that the assessment is illegal, erroneous or unequal, but does not deny the facts set forth in the petition, such denials are mere conclusions which do not raise any issue of fact, and the Special Term may properly grant a reduction of the assessment and need not take or direct the taking of testimony.

VAN BRUNT, P. J., dissented.

APPEAL by the defendants, James L. Wells, president, and others, as commissioners of taxes and assessments, constituting the board of taxes and assessments of the city of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of January, 1904, reducing an assessment upon the relator's personal property and denying the defendants' motion that testimony be taken.

George S. Coleman, for the appellants.

Henry W. Rudd, for the respondent.

McLAUGHLIN, J.:

An assessment of \$60,000 was imposed upon the relator's property for the year 1902. After the same had been made, and while the assessment books were open for correction, the relator applied for a reduction thereof and filed with the tax commissioners a verified statement showing its financial condition for the purposes of taxation for the year named. According to this statement its gross assets were \$52,456.73, of which \$17,579.53 consisted of "imported merchandise in original packages in bonded warehouse" and its indebtedness, \$33,915.67. Upon this statement, the truth of which so far as appears was then unquestioned by the tax commissioners, the relator's assessment was reduced from \$60,000 to \$18,540, the latter figure being reached by deducting the indebtedness as shown by the statement from the gross assets. No deduction, however, was made for the imported merchandise in original packages in bonded warehouse amounting to \$17,579.53. Thereafter the relator, claiming to have been aggrieved by the assessment, inasmuch as the

value of the imported merchandise was not deducted, upon a petition setting out the foregoing facts, obtained a writ of certiorari to review the proceedings of the commissioners. In the return to the writ the commissioners alleged that the imported merchandise in original packages was not deducted because the verified statement was filed by the relator "only two business days before the tax books closed under the provisions of the Greater New York Charter, and under the press of business at that time we were unable to verify the statements so made by the relator or ascertain the details with regard to its assets and liabilities. The statement did not disclose what portion of such accounts had been incurred in the purchase of imported merchandise in the original packages, and as we were informed that the relator's business consisted in a large part of buying and selling such imported merchandise, the statement appeared to us utterly unsatisfactory. For all of these reasons we were led to disbelieve the statement of relator." The return further alleges that the commissioners "were unable to ascertain whether any of such accounts payable were incurred in the purchase of imported merchandise in the original packages which are non-taxable by us, or whether the relator had borrowed money to pay for such imported merchandise in the original packages, or what portion of the bills and accounts payable were directly or indirectly incurred in the purchase of such imported merchandise in the original packages, but we assumed that of such indebtedness at least the sum of \$17,579 was so incurred directly or indirectly and, therefore, did not deduct the amount of such imported merchandise owned by relator as disclosed by such statement to be of the value of \$17,579. We accordingly deemed the sum of \$18,540 to be the sum for which the relator was lawfully and justly assessable upon its personal property. * * * "

Upon the matter coming on to be heard before the Special Term the relator moved upon the petition, writ and return thereto, for judgment as prayed for in the petition and that the assessment be reduced to the sum of \$961. The defendants moved that the writ be quashed upon the ground that the relator had failed to produce testimony to support the allegations of the petition, and if such motion should be denied, that the court take testimony upon the issues raised by the petition and return, or appoint a referee for that pur-

pose. The relator's motion was granted and the defendants have appealed.

I am of the opinion that the order appealed from should be affirmed. The verified statement filed by the relator showed its assets, indebtedness and the amount of personal property which was not subject to assessment. This statement was not contradicted, nor was it disputed in any way. The assumption on the part of the commissioners that some part of the indebtedness might possibly have been incurred in the purchase of non-taxable property was not only unsupported by evidence, but was contradicted by the statement itself. It appeared therein that the relator was asked: "Has any portion of above indebtedness been contracted or incurred in the purchase of non-taxable property or securities? * * *" To which it answered, "No." There being nothing, therefore, to contradict this evidence the commissioners could not arbitrarily disregard it. (*People ex rel. Edison General Electric Co. v. Barker*, 141 N. Y. 251; *People ex rel. Consolidated Gas Co. v. Feitner*, 78 App. Div. 313.) If they were not satisfied with the statement they could have required further information from the relator on that subject. This, however, they did not do. Having accepted it as true it is no answer when the validity of the assessment is challenged, to allege that they did not believe what was therein stated. Official acts must have something more for their support when brought under judicial review than a mere surmise or belief. There must underlie the belief some evidence tending to justify it. Assessing officers cannot act arbitrarily. When evidence is laid before them as to the existence of certain facts they are bound to consider and act upon it. Of course they are not bound by statements which are contradicted and which they disbelieve where good reasons exist for such disbelief (*People ex rel. Manhattan Railway Co. v. Barker*, 146 N. Y. 314), but where a statement is made, the truth of which is not disputed, a mere surmise that it may not be true does not justify assessing officers in rejecting such statement or acting otherwise than in accordance therewith. Here, the verified statement filed by the relator with the commissioners disclosed the relator's property and that part of it which was assessable. The facts being undisputed, the same were conclusive and entitled the relator to have its assessment reduced to the amount to which the

Special Term reduced it. (*People ex rel. Edison Electric Illuminating Co. v. Barker*, 139 N. Y. 63.) But the appellants insist that the Special Term, instead of reducing the assessment, should have taken testimony bearing upon the issues involved, or sent the matter to a referee for that purpose. This is undoubtedly true if an issue of fact were raised by the petition for and the return to the writ. (*People ex rel. Thomson v. Feitner*, 168 N. Y. 441; *People ex rel. Bronx Gas Co. v. Feitner*, 43 App. Div. 198; *People ex rel. Broadway Realty Co. v. Feitner*, 61 id. 156; affd. on prevailing opinion below, 168 N. Y. 661; *People ex rel. Citizens' Lighting Co. v. Feitner*, 81 App. Div. 118.) Here, there was no issue of fact raised by the petition and return. It is true in the return the commissioners denied that the assessment was erroneous by reason of overvaluation or was unequal in that it was made at a higher proportionate valuation than other real or personal property on the same roll, or that the same was upon any of the grounds illegal, erroneous or void. But the facts set out in the petition upon which such claims were made were not denied, and, therefore, these denials were mere conclusions, unsupported by and contrary to the admitted facts. This being the situation the court at Special Term properly denied defendants' motion to quash the writ or take evidence, and properly granted relator's motion to reduce the assessment.

The order appealed from, therefore, must be affirmed, with ten dollars costs and disbursements.

PATTERSON and LAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

O'BRIEN, J. (concurring):

The question of whether there could be a new assessment at Special Term upon new evidence taken was directly presented in *People ex rel. Citizens' Lighting Co. v. Feitner* (81 App. Div. 118), and my view then was that that could not be done; but the majority of this court thought otherwise. If the relator under the decisions of this court has a right to have a reassessment by the Special Term, no good reason is suggested why the same right should not be accorded to the tax commissioners. The present view of the majority, as I read the opinion, is against reassessment by the court on the application of the city and that the validity and correctness of the tax

must depend upon the facts before the commissioners when the tax is imposed. If the city will not be allowed to introduce additional testimony on the hearing at the Special Term to sustain their determination, it seems to me for the reasons stated in *People ex rel. Citizens' Lighting Co. v. Feitner (supra)* that one assailing the tax has no greater right. The present decision inclining to the view, therefore, that there should be no reassessment by the court at Special Term, I concur in the result.

VAN BRUNT, P. J. (dissenting):

I dissent. The facts set out in the petition were denied, and under the decisions of this court, as I understand them, the defendants were entitled to offer evidence as a matter of right.

Order affirmed, with ten dollars costs and disbursements.

DENYS W. CORBET, Respondent, v. MANHATTAN BRASS COMPANY,
Appellant.

Agreement by a manufacturer of a patented article to pay royalties to the inventor — construction thereof.

The inventor of a bicycle lamp made an agreement with a manufacturing corporation, by which such corporation agreed to manufacture and sell the lamps and pay him a royalty of twelve and a half cents upon each lamp so manufactured and sold. The agreement further provided that the corporation "hereby further promises and agrees that the royalty on lamps shall not in any year net the party of the first part (the inventor) less than Five hundred dollars (\$500), and in the event of said royalty netting the party of the first part less than Five hundred dollars (\$500), or in the event of the discontinuance by the party of the second part of the manufacture or sale of lamps embodying the improvements claimed in said patents, and for which the said party of the second part is liable for royalty, then the said party of the second part hereby promises and agrees to forthwith assign the said patents above referred to and all rights thereunder, except as hereinbefore specified, to said Corbet, party of the first part, without other consideration than the release from paying further royalty or royalties.

"It is mutually understood and agreed that the failure of the party of the second part to pay the minimum amount of royalty named, or the discontinuance of the manufacture or sale referred to, shall not relieve the party of the second part from the payment of such royalty or royalties as may be due the party of the first part at the time of such termination of the contract and assignment of the said patents to the party of the first part."

Held, that it was optional with the corporation to discontinue the manufacture and sale of the lamps;

That if it did discontinue such manufacture and sale, or if the number of lamps manufactured and sold by the corporation in any year was not sufficient to produce a royalty of \$500, the inventor was entitled to a reassignment of the patents;

That the corporation was not obliged to pay the inventor a minimum of \$500 per annum as royalty until such time as it reassigned the patents to him; that it was only obliged to pay him a royalty of twelve and a half cents upon each lamp manufactured and sold by it.

Semble, that the corporation could not abandon the manufacture of the lamps, and, by tendering the inventor \$500, hold the patents and thus prevent the inventor from placing his invention upon the market.

O'BRIEN, J., dissented.

APPEAL by the defendant, the Manhattan Brass Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 7th day of August, 1903, upon the report of a referee.

George Ryall, for the appellant.

Harrie C. Manheim, for the respondent.

LAUGHLIN, J.:

The action is brought to recover money pursuant to the terms of a contract in writing. The plaintiff was the inventor of certain improvements in bicycle lamps on which he had applied for patents. On the 10th day of January, 1895, the parties signed a contract by which the plaintiff agreed to assign to the defendant all patents for such improvements obtained by him, and to give the defendant the exclusive right to manufacture and sell the same until the expiration of the patents, in consideration of which the defendant agreed to pay the plaintiff a royalty of twelve and one-half cents for each bicycle lamp with said improvements that it might sell, and to account therefor semi-annually. On the twenty-fifth day of September in the following year this agreement was modified in writing. It would seem that in the meantime plaintiff had been engaged by the defendant as a salesman, for the modified agreement recites that in consideration, among other things, of such employment he releases the defendant from past and future royalties on a particular bicycle lamp, which embodied one or more of the features of a patent

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granted to him, and the defendant released the plaintiff from his obligation to assign to it patents or future improvements which he might make on bicycle lamps. The agreement, so far as material to the present inquiry, then provides as follows: "The party of the second part (the defendant) * * * hereby further promises and agrees that the royalty on lamps"—other than those from which it has been released from accounting—"shall not in any year net the party of the first part less than Five hundred dollars (\$500), and in the event of said royalty netting the party of the first part less than Five hundred dollars (\$500), or in the event of the discontinuance by the party of the second part of the manufacture or sale of lamps embodying the improvements claimed in said patents, and for which the said party of the second part is liable for royalty, then the said party of the second part hereby promises and agrees to forthwith assign the said patents above referred to, and all rights thereunder, except as hereinbefore specified, to said Corbet, party of the first part, without other consideration than the release from paying further royalty or royalties.

"It is mutually understood and agreed that the failure of the party of the second part to pay the minimum amount of royalty named, or the discontinuance of the manufacture or sale referred to, shall not relieve the party of the second part from the payment of such royalty or royalties as may be due the party of the first part at the time of such termination of the contract and assignment of the said patents to the party of the first part."

The plaintiff assigned certain patents to the defendant pursuant to the agreement, and it accounted to him for royalties, at the rate specified, on all bicycle lamps manufactured thereunder down to January, 1901. The defendant then discharged the plaintiff and he thereafter brought this action to recover the difference between the royalties at the rate of \$500 per annum for the years 1897 to 1902, inclusive, and the sum of \$321.39, being the amount of the royalties received prior to his discharge. The plaintiff has received royalties on the lamps sold by the defendant pursuant to his patents at the rate of twelve and one-half cents per lamp, but he now claims to be entitled by virtue of the contract to a minimum of \$500 per annum for each and every year until such time as the defendant shall reassign to him the patents, which has not been done. It does not

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appear that the plaintiff has demanded a reassignment of the patents or that the defendant has tendered such reassignment. It is clear from the terms of the contract that it was optional with the defendant whether to continue the manufacture or sale of the lamps embodying the patents, but in the event of its discontinuing such manufacture or sale the plaintiff was entitled to a reassignment of the patents. The plaintiff was also entitled to a reassignment of the patents if the bicycle lamps manufactured and sold by the defendant pursuant to the contract in any year were not sufficient to produce a royalty of \$500 to the plaintiff at twelve and one-half cents per lamp. It is evident that the obligations of the defendant to the plaintiff under the contract could not be satisfied by the mere payment of \$500 per annum. The defendant bound itself to manufacture and sell sufficient bicycle lamps to produce, at the rate of twelve and one-half cents per lamp, a royalty of \$500 per annum to the plaintiff or to reassign the patents. The plaintiff was interested in the manufacture and sale of his lamps as well as in the royalty, and the defendant could not abandon the manufacture or refrain from manufacturing and selling a sufficient number to produce the royalty, at the rate specified, and by tendering the plaintiff \$500 hold the patents and thus prevent the plaintiff from placing his invention on the market. (*Genet v. D. & H. C. Co.*, 136 N. Y. 593, 611.) The precise question for decision, however, is whether the defendant obligated itself to pay the plaintiff \$500 per annum until such time as it reassigned to him the patents. The appellant contends that its promise was to pay *royalties*, and that if it suspended manufacture or sale of the lamps, or if at the end of any year it should appear that the sales would not produce a *royalty* of \$500, the plaintiff was entitled to a reassignment of the patents at his election. This appears to be the literal construction of the agreement. The promise of the defendant is that the "*royalty*" shall not net the plaintiff less than \$500 in any one year, and it is contemplated that the royalty may net him less, for it is expressly provided that in the event of "said royalty netting the party of the first part less than five hundred dollars" the party of the second part shall forthwith reassign the patents. The respondent lays stress upon the last sentence of the agreement quoted. We think this sheds no light upon the true construction. It was merely intended

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to provide that the reassessments of the patents upon the discontinuance of the manufacture or sale, or upon the defendant's failure to manufacture and sell sufficient to produce a royalty of \$500 in any one year, should not release the defendant from the payment of the royalty then due. It is evident that in that event there might be royalty due at the rate of twelve and one-half cents per lamp, so that the royalty therein referred to as not being released is not necessarily the minimum royalty of \$500.

Since the right of the plaintiff to recover depends upon the construction of this contract, the execution of which is conceded, the judgment should be modified by directing final judgment for the defendant, dismissing the complaint, with costs to the defendant of the trial and of the appeal.

VAN BRUNT, P. J., PATTERSON and McLAUGHLIN, JJ., concurred; O'BRIEN, J., dissented.

Judgment modified as directed in opinion, with costs to defendant of the trial and of appeal.

CHARLES PACHE, Appellant, v. BERTHA OPPENHEIM, as Executrix, etc., of ELIZA PACHE, Deceased, Respondent.

Payment by a husband of his wife's funeral expenses—reimbursement from her estate—he may bring the action therefor in the New York Municipal Court.

A husband who pays his wife's funeral expenses is entitled to reimbursement from the wife's estate for the reasonable expenses so incurred.

Assuming that the liability of the wife's estate to the husband is based upon a *quasi* contract, an action to enforce such liability is an action to recover damages upon contract within the meaning of subdivision 1 of section 1 of the New York Municipal Court Act (Laws of 1902, chap. 580), which confers on such court jurisdiction of "an action to recover damages upon or for breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed five hundred dollars."

APPEAL, by permission, by the plaintiff, Charles Pache, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of said court on the 23d day of November, 1903, which order affirmed a judgment of the Municipal Court of the city

of New York, borough of Manhattan, in favor of the defendant, entered on the 9th day of May, 1903, sustaining the defendant's demurrer to the plaintiff's complaint and dismissing the said complaint.

Omar Powell, for the appellant.

Edward W. S. Johnston, for the respondent.

PATTERSON, J.:

This action was brought in the Municipal Court of the city of New York and the plaintiff alleged in his complaint that Eliza Pache died at the city and county of New York on the 26th day of February, 1902; that he was her husband; that the defendant is the executrix of the estate of his deceased wife and duly qualified as such executrix; that his wife died, leaving property sufficient and ample to satisfy and pay all her debts and funeral expenses; and that one Stolzenberger, an undertaker, took charge of the funeral arrangements and performed certain services in connection therewith and furnished materials therefor, for which he rendered a bill to the plaintiff as husband of the deceased, which bill the plaintiff paid and that the charges therein were the reasonable value of the services rendered and the materials furnished by the undertaker; that the plaintiff presented his claim as one against the estate of his deceased wife and offered to refer it and that being refused by the executrix, this action was brought.

Concerning the liability of the estate of the deceased wife to the husband for the funeral expenses thus paid, we must follow the authorities in this State, which hold that a husband has a right of recovery of the reasonable expenses incurred and actually paid in connection with the burial, the common-law obligation of the husband to provide for the proper sepulture of his wife being a matter which never has been disputed. The necessity of providing for the proper interment of the remains of the wife before an executor acts or may act indicates at once the duty of the husband, and indeed it was a rule of the common law that any one in whose house a person died was under the obligation to see to the proper interment of the remains of the deceased. (Lord DENMAN, in *Queen v. Stewart*, 12

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Ad. & El. 773.) But notwithstanding this common-law obligation, it has been held by the courts of this State that, under the law as it exists here, the husband, having paid this reasonable expense, may recover from the wife's estate; and that was distinctly ruled in *Patterson v. Patterson* (59 N. Y. 574). The liability of the estate of the wife for reimbursement to the husband is also recognized in *McCue v. Garvey* (14 Hun, 562) where, upon the settlement of the accounts of a husband as administrator of the estate of his deceased wife, he was allowed out of her estate the necessary and proper funeral expenses paid by him. In *Freeman v. Coit* (27 Hun, 450) Judge DANIELS, referring to *Patterson v. Patterson* and *McCue v. Garvey*, says that in this State where such an expenditure has been made by the husband, and the deceased wife has left a separate estate owned by her, he has been allowed to reimburse himself from such estate; and we held in *Patterson v. Buchanan* (40 App. Div. 493) that such an action as this would lie. It is argued, however, that the decision in that case has been virtually overruled by what is said by the Court of Appeals in *O'Brien v. Jackson* (167 N. Y. 31), but what was there decided has no such effect, and does not apply here.

We agree with the Appellate Term, therefore, that the plaintiff might recover upon the cause of action asserted in the complaint; but this action was brought in a Municipal Court, and the learned justices of the Appellate Term are of the opinion that it could not be maintained in the Municipal Court, because its jurisdiction is confined to contracts express or implied; and they considered that the obligation sought to be enforced here did not arise upon either an express or an implied contract, but that there was only a *quasi*-contractual relation of which the Municipal Court could not take jurisdiction. If an executor is liable for the expenses of the burial of the testatrix, from that obligation the law implies a promise to him who, in the absence or neglect of the executor, directs, not officially, but from the necessity of the case, a burial and incurs the reasonable expense thereof. (*Patterson v. Patterson, supra.*) In *Rappelyea v. Russell* (1 Daly, 217) it is said that it is well settled that an executor, if he have sufficient assets, is liable upon an implied promise to a third person, who, as an act of duty or necessity, has provided for the interment of the deceased, if the funeral was con-

ducted in a manner suitable to the testator's rank in life, and the charge is fair and reasonable. Citing *Tugwell v. Heyman* (3 Camp. 298); *Rogers v. Price* (3 Younge & J. 28); *Corner v. Shew* (3 M. & W. 350); *Brice v. Wilson* (8 Ad. & El. 349, note); *Hapgood v. Houghton* (10 Pick. 154).

The learned Appellate Term regarded the Municipal Court as being without jurisdiction to entertain this action, because the obligation existing upon the part of the estate was one which did not rest either in express or implied contract, but was one that arises from an imposed legal obligation which had the status of a *quasi* contract; and they considered that a *quasi* contract was not an implied contract within the meaning of subdivision 1 of section 1 of the Municipal Court Act (Laws of 1902, chap. 580). The provision of law respecting the jurisdiction of the Municipal Court, so far as it relates to the present action, is as follows: Except as otherwise provided, the court has jurisdiction of "an action to recover damages upon or for breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed five hundred dollars." Of course, it is understood that the jurisdiction of local and inferior courts is not to be extended or amplified by construction, but is to be confined within the limits of that which is conferred. But in the case of the Municipal Court in the city of New York, the jurisdiction conferred is not simply of actions to recover damages for the breach of contract, express or implied, other than a promise to marry, but it extends to an action brought to recover damages *upon contract*, express or implied. The phraseology of this subdivision 1 of section 1 of the Municipal Court Act indicates the purpose of the Legislature in the establishment of the Municipal Court to define what jurisdiction it shall have *in actions upon* contract, and it is well understood that, for the purposes of remedial justice, actions, based upon obligations, not resting in consent actually given or implied from facts, but upon what are called *quasi* or constructive contracts, are put in the same category as actions *upon* contract, express or implied, in which the element of consent actually exists, or is to be inferred as matter of fact from the circumstances out of which the obligation arose.

In *Wickham v. Weil* (17 N. Y. Supp. 518) the General Term of the Court of Common Pleas, speaking through Judge PRYOR, sums

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up the situation in a few words, as follows: "Three classes of obligations are known in law as 'contracts,' and are especially so distinguished for the purposes of remedial justice, namely, 'express contracts,' 'implied contracts,' and 'constructive contracts.' 'Express contracts' are those the terms of which are averred and uttered by the parties. (Broom Com. Law, 250.*) 'Implied contracts' are such as reason and justice dictate, and which the law, therefore, presumes that every man undertakes to perform. (2 Bl. Comm. 443.) 'Constructive contracts' arise 'when the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all, but between whom circumstances make it just that one should have a right, and the other be subject to a liability, similar to the rights and liabilities in cases of express contract.'" These constructive contracts are *quasi* contracts.

Now, an action *upon contract* may be maintained on *quasi* contracts. As, for instance, actions for money had and received (*Merchants' Bank of Macon v. Rawls*, 7 Ga. 191; 50 Am. Dec. 394); money paid by one person who has been compelled to pay it, and which another should have paid (*Wells v. Porter*, 7 Wend. 119), and cases in which an obligation to pay money is imposed by statute (*Steamship Co. v. Joliffe*, 2 Wall. 450), and not connected simply with the imposition of a penalty. It has been held that an action for money had and received may be maintained in the Municipal Court. (*Dechen v. Dechen*, 59 App. Div. 166.)

Whether the obligation arising from a *quasi* contract is one imposed by statute or arising from some general principle of law is immaterial. Assuming that the whole relation is one *quasi* contractual and that no contract, as matter of fact, exists at all, yet, for the purpose of a remedy, the *quasi* contract is considered as if it were an actual contract, and when an action within the limitation of \$500 is brought in a Municipal Court on such an obligation, it is an action for *damages upon contract* and the jurisdiction attaches.

The determination should be reversed, with costs, and the demurrer overruled, with costs, with leave to the defendant to withdraw demurrer and to answer in the Municipal Court, in accordance with

* See 1st Am. ed.—[REP.]

the rules and practice of that court, upon payment of costs in all the courts.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Determination reversed, with costs, and demurrer overruled, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in all the courts.

SAMUEL J. SAMPSON and HENRY OPPENHEIMER, Respondents, *v.* MARX OTTINGER and MOSES OTTINGER, Composing the Firm of OTTINGER BROTHERS, Appellants.

Broker employed to sell real property—when entitled to recover commissions—refusal of the customer proposed by the broker to negotiate through him—the employer may deal with such customer either personally or through another broker.

In order to entitle a broker employed to sell real property to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms; he is not entitled to commissions for unsuccessful efforts to effect a sale, unless the failure is due to the fault of his employer.

Where the broker presents to his employer the name of a customer, and the latter, through no fault of the employer, refuses to enter into any negotiations through the medium of such broker, the broker is not entitled to commissions if the premises are subsequently sold to such customer through the medium of another broker.

The employer violates no right of the broker in negotiating directly with the proposed customer, after the broker has failed to bring such customer to specified terms and has abandoned his efforts in that direction, nor is the employer liable for commissions under such circumstances if his independent negotiations result in a sale.

APPEAL by the defendants, Marx Ottinger and Moses Ottinger, composing the firm of Ottinger Brothers, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 8th day of May, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 12th day of May, 1903, denying the defendants' motion for a new trial made upon the minutes.

The action was to recover brokers' commissions on a sale of real

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property, it being alleged in the complaint that the plaintiffs were employed by the defendants as brokers to find a purchaser of the property; that they performed the services for which they were employed and that through their efforts a contract was made between the defendants and a purchaser of the property, and that the defendants promised and agreed to pay the plaintiffs for their services a commission of one per cent, which they have failed to pay. The answer, so far as the merits are concerned, is a general denial.

Nathan Ottinger, for the appellants.

Bertram L. Kraus, for the respondents.

PATTERSON, J.:

It is evident from the record in this case that the verdict of the jury in favor of the plaintiffs is against the weight of evidence. There is no doubt of the plaintiffs having been employed originally by the defendants to negotiate a sale of the defendants' property mentioned in the complaint, with a building loan to be made to the purchaser. That fact is conceded by the defendants; but it is equally apparent on the whole testimony that the plaintiffs did not find a purchaser who agreed to the terms of a contract. The duty of a broker employed to sell property is to bring the buyer and seller into accord. To entitle him to commissions he must produce a purchaser ready and willing to enter into a contract on the employer's terms; and the broker is not entitled to commissions for unsuccessful efforts to effect the sale, unless the failure is the fault of the principal. (*Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378.)

It is shown by the proofs in this case that Oppenheimer, one of the plaintiffs, had conversations with one or both of the defendants with respect to the premises mentioned in the complaint, and that he stated to them that he had a party who might be willing to purchase the property and that the defendants, or one of them, said that if he produced that party and terms were mutually agreed upon, they would pay him a commission. But the plaintiffs did not produce that party. They gave the name of Houpt & Son as the persons the plaintiff Oppenheimer had in mind as purchasers, but they did not produce them, successfully negotiate with them, nor

bring them and the defendants into accord as to the terms of a contract. On the contrary, Houpt & Son refused to have anything to do with the plaintiffs as brokers or to enter into any negotiations with or through them, or to entertain any proposition respecting the purchase of the defendants' property through the agency or instrumentality of the plaintiffs.

It is clear from the testimony that the defendants never repudiated the employment of the plaintiffs and were willing to have them continue to act, if they brought about an accord between the defendants and Houpt & Son or induced the latter to enter into direct negotiations. But when Houpt & Son refused to deal with the plaintiffs and would not negotiate through them or recognize them or enter into relations with the defendants through the agency of the plaintiffs as brokers, and the defendants subsequently came into relations with Houpt & Son through other brokers it cannot be said that the defendants interfered with the plaintiffs so that the latter could not accomplish the purpose for which they were employed. The strongest evidence upon which the plaintiffs can rely is Oppenheimer's statement that Mr. Ottinger said to him: "You try to get Mr. Houpt down, whether he comes down with you or without you. I have got your principal's name and I will protect you." The plaintiffs did not get Mr. Houpt to call upon the defendants. The defendants testified that they required that Mr. Houpt should come to them personally to negotiate respecting the terms of an agreement for a sale relating particularly to the time at which payments were to be made by the Ottingers on advances on a building loan. The statement of Mr. Oppenheimer referred to is an admission that it was his business either to bring or to cause Mr. Houpt to come to the defendants. In other words, he was to be the procuring cause of the purchaser meeting and entering into negotiations with the defendants. Houpt absolutely declined to do so on the invitation of Oppenheimer. He would have nothing to do with him and would not entertain a transaction through his agency. This was not in consequence of any fault of the defendants, and when Houpt & Son came into the transaction through other brokers, the defendants were at liberty to contract through the intervention of those other brokers. The plaintiffs failed to find a purchaser. Houpt & Son would not agree upon

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terms or have anything to do with the plaintiffs, and, as was said in *Hay v. Platt* (66 Hun, 488), the employer violates no right of the broker in negotiating directly with a proposed customer, after the broker has failed to bring such customer to specified terms and has abandoned his efforts in that direction. Nor is he liable for a commission under such circumstances if his independent negotiation results in a sale.

Without considering other matters urged as grounds for a reversal of this judgment, we think the verdict was clearly against the weight of evidence and that the judgment and order should be reversed and a new trial granted, with costs to appellants to abide the event.

VAN BRUNT, P. J., INGRAHAM, McLAUGHLIN and HATCH, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellants to abide event.

RICHARD K. FOX, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Appeal from an order setting aside a verdict — exception to the admission of incompetent evidence — when not available on a motion to set aside the verdict — the Appellate Division may examine the opinion of the trial judge — statement therin that the verdict was set aside as a matter of discretion.

Where, on a jury trial, the court admits incompetent evidence, over the objection and exception of the plaintiff, but offers to strike out such incompetent testimony or to declare a mistrial, if the plaintiff declines each of such offers and elects to run the risk of obtaining a favorable verdict from the jury, the exception taken by him to the admission of the incompetent evidence is not available to him on a motion to set aside an unfavorable verdict.

Seemle, that upon an appeal from an order setting aside a verdict, the Appellate Division may examine into the opinion of the trial judge to ascertain the grounds upon which the order was made.

A statement in the opinion that the verdict was set aside as a matter of discretion can refer only to the weight of evidence.

APPEAL by the defendant, the Metropolitan Street Railway Company, from an order of the Supreme Court, made at the New York

Trial Term and entered in the office of the clerk of the county of New York on the 11th day of June, 1903, setting aside the verdict of a jury theretofore rendered in the above-entitled action in favor of the defendant and granting to the plaintiff a new trial.

Charles F. Brown, for the appellant.

Frederick B. House, for the respondent.

O'BRIEN, J.:

The plaintiff seeks in this action to recover damages for personal injuries alleged to have been received through the negligence of the defendant.

The plaintiff testified that on the 4th day of November, 1900, at about half-past six in the evening, he was a passenger on an east-bound car of the defendant's railroad on One Hundred and Twenty-fifth street; that when the car was between Lenox and Fifth avenues, he told the conductor to stop at Fifth avenue; that as the car approached the corner he left his seat to get off; that the car stopped at the corner on the westerly side of Fifth avenue as he got on the platform and started to leave the car, and that as he was getting off the car started with a jerk, broke his hold on the cross-bar and threw him off, inflicting painful injuries. The plaintiff was corroborated by a police officer who testified that he saw the accident, that at the time the plaintiff attempted to get off the car was standing perfectly still, and that as he was getting off the car started suddenly and threw him.

For the defendant the conductor testified that the plaintiff asked him to stop the car at Fifth avenue, and that as was customary he stopped on the west crossing and, after having again started up the car, it was moving very slowly when the plaintiff asked him to stop; and he said all right, he would stop on the other side and requested him not to step off until they came to a full stop, but he took no notice; that "he had a cane in his hand. He stepped off holding the cane in his right hand and held on to the hand rail with the left, and in doing so the cane tripped him." Another witness called by the defendant testified that he was standing on the rear platform of the car and that after the car stopped on the west side of Fifth avenue, it started up again on the signal of the conductor and was moving

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slowly across Fifth avenue when the plaintiff got up from his seat in the car; "I saw him get on the step with the left hand on the stanchion and the right foot extending over the step. He had a cane in the left hand and he had hold of the rail. * * * He stepped off somehow or other; I believe the cane tripped him." Another witness testified that he was also on the rear platform and that the car was going over slowly when Mr. Fox started to get off. "He used his cane as a support and had his left hand on the railing on the box of the car. When the conductor seen him going off he told him to wait until he got to the other side of the street and he didn't pay any attention to him."

With respect to the two versions, therefore, as to the cause of the accident, there was a clean-cut question of fact, and whether we regard the number of witnesses or the credibility to be attached to their testimony as weighed in the light of whether they were or were not disinterested, it cannot be said that the verdict rendered in favor of the defendant was so clearly against the weight of evidence that the learned trial judge on this ground would have been justified in setting it aside. Nor do we understand that this was his reason, because this court can examine into the opinion of the trial judge to ascertain the grounds upon which the decision was made. (*Bryant v. Allen*, 54 App. Div. 500; *Crossman v. Wyckoff*, 64 id. 554, 558.) From the opinion of the trial judge it appears that the verdict was set aside because of the admission in evidence of the statement of a Dr. Cook which the trial judge regarded not only as harmful but as incompetent.

We have no reason to differ with this view of the evidence, but, regarding it as harmful and incompetent, it remains to determine whether, in view of the manner in which such evidence was treated by the plaintiff's attorney, the exception taken to its admission was available upon the motion to set aside the verdict.

The conductor testified that he heard a conversation between the plaintiff and a Dr. Cook in reference to the accident, and was then asked: "You may state the conversation that you heard between Dr. Cook and the plaintiff with reference to the happening of this accident?" Whereupon the plaintiff's counsel said: "I object to it as far as it involves any statement on the part of Dr. Cook; I do not object to his stating what Mr. Fox

said." An extended colloquy then followed between the court and counsel, and the witness answered in response to the court's inquiry: "Mr. Fox said nothing on that occasion when Dr. Cook spoke." Finally the question was asked: "You may state what conversation you heard between Dr. Cook and Mr. Fox in reference to this accident?" This was objected to as incompetent, and the objection was overruled and an exception taken. The witness then answered in part as follows: "This gentleman standing on the sidewalk looking at the whole affair said when asked for his name by Mr. Fox, 'I refuse to give you my name; it is your own fault; you had no right to step off the car when it was in motion.' Then he said, 'You must be one of their shoo-flys or inspectors.'"

After this testimony had been received the court said to plaintiff's counsel: "If you want me to declare this a mistrial I will on account of what (has been) brought out about Dr. Cook's statement. * * * I leave it to you." And the plaintiff's counsel answered: "No; I would rather have the record stay as it is." Again after the defendant had rested and the plaintiff was giving rebuttal testimony the court said: "I am going to strike out the evidence of what Dr. Cook said," and the plaintiff's counsel stated: "It is already before the jury and I submit that I should be allowed to rebut it," and the court replied: "If you do not want me to strike it out, very well."

The court, it thus appears, was desirous of protecting fully the plaintiff's rights, and, as testimony had inadvertently been admitted which the judge regarded as incompetent, he offered to the plaintiff the only remedies that could be offered, namely, to strike out the testimony, or, if the plaintiff wished, to declare a mistrial and thus enable him to go before another jury. Obviously, after these two offers were made by the court and declined by counsel, the exceptions taken to the rulings of the court were valueless. Having taken the chances of a favorable verdict and been disappointed, the plaintiff could not, since he had in effect waived the exceptions by rejecting the court's offers, subsequently, upon the ground that the rulings to which such exceptions were taken were erroneous, move to set aside the verdict.

We think it will be conceded that upon a trial, though a court may commit an error in a ruling, it is entirely competent to cure

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that error by striking out the testimony—if that is sufficient to remedy the harm done—or by permitting the party against whom the ruling is made to have a new trial. In other words, there is for the trial judge a *locus paenitentiae*, or a right, when the court thinks proper to change its ruling, to call attention to it, as was done by the learned trial judge, and offer to remove any harm or prejudice which the party may have suffered by reason of the ruling. If, upon such option being given to counsel, he sees fit to reject it and proposes to speculate on the verdict of the jury, he cannot, if disappointed at the outcome, then have a new trial. The cases are uniform in holding that counsel upon the trial can waive the right which he has secured by a proper exception, and that when once waived it is gone forever, and hence is not thereafter available upon a motion for a new trial or to set aside a verdict. (*Foster v. Tanenbaum*, 2 App. Div. 168; *Brady v. Nally*, 151 N. Y. 258; *Brown v. Mayor*, 11 Hun, 23; *Ward v. Craig*, 87 N. Y. 550; *Hopkins v. Clark*, 158 id. 299; *Neil v. Thorn*, 88 id. 270.)

We have not overlooked the fact that the learned trial judge in his opinion states that he sets aside the verdict not alone because of the testimony of the conductor as to what Dr. Cook said, but also as a matter of discretion. We concur, however, with the statement in the respondent's brief that such discretion "can refer only to the weight of the evidence." To the subject of the weight of evidence we have already referred, our conclusion being that on this ground the verdict could not properly be set aside.

It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and the verdict reinstated.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and verdict reinstated.

SUSANNA MAUDE JARVIS and REBECCA JOSEPHINE JARVIS, Individually and as Executrices, etc., of NATHANIEL JARVIS, JR., Deceased, Respondents, *v.* THE AMERICAN FORCITE POWDER MANUFACTURING COMPANY, Appellant.

Cancellation of notice of lis pendens — when discretionary and when a matter of right — what judgment rendered in an action of ejectment is a final judgment — definition of final judgment.

Under section 1674 of the Code of Civil Procedure, relating to the cancellation of notices of *lis pendens*, which provides, "after the action is settled, discontinued, or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired, or if a plaintiff filing the notice unreasonably neglects to proceed in the action, the court may, in its discretion, upon the application of any person aggrieved," direct that the notice be canceled, discretion as to the cancellation of the notice is conferred upon the court only where the plaintiff "unreasonably neglects to proceed in the action;" in the other instances enumerated in the section the defendant is entitled, as a matter of right, to have the notice canceled.

Where an appeal to the Appellate Division, taken by the plaintiff in an action of ejectment from a judgment dismissing his complaint upon the merits, is dismissed for a failure to prosecute it, such judgment is a final judgment within the meaning of section 1674 of the Code of Civil Procedure, and the defendant is entitled, as a matter of right, to have the notice of the pendency of the action canceled.

The fact that, under section 1525 of the Code of Civil Procedure, the plaintiff is entitled, as a matter of right, to have the judgment vacated and a new trial of the action granted upon compliance with certain conditions, does not affect the final character of the judgment.

Somble, that a final judgment is not simply one which finally determines the rights of the parties with reference to the subject-matter of the litigation, but includes one which finally determines their rights with reference to the particular suit.

APEAL by the defendant, The American Forcite Powder Manufacturing Company, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of November, 1903, denying the defendant's motion to cancel the notice of *lis pendens* theretofore filed in this action.

Edmund L. Baylies, for the appellant.

Louis Marshall, for the respondents.

O'BRIEN, J.:

The action was in ejectment in which the plaintiffs filed a notice of *lis pendens*. After a trial, a verdict of a jury having been rendered in favor of the defendant, a judgment was entered dismissing the complaint upon the merits. The plaintiffs appealed to this court, but their appeal was dismissed for failure to prosecute it. The defendant thereafter moved for an order canceling the notice of pendency of the action, which motion was denied, and from the order entered thereon the defendant appeals.

Section 1674 of the Code of Civil Procedure provides that "after the action is settled, discontinued, or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired, or if a plaintiff filing the notice unreasonably neglects to proceed in the action, the court may, in its discretion, upon the application of any person aggrieved," direct that the notice be canceled.

The learned judge at Special Term placed his denial of the motion upon the ground, *first*, that the judgment in the ejectment suit was not such a final judgment as entitled the defendant to have it canceled, and, further, that even though it were to be regarded as a final judgment, it was still discretionary with the court as to whether or not it would direct its cancellation. In this latter view we think the learned judge inadvertently fell into error, because a reading of the section will show that the conditions or circumstances under which the notice may be canceled are disjunctive, and that the court is only given a discretion as to whether it will or will not direct the cancellation in cases where the ground relied upon is that the "plaintiff filing the notice unreasonably neglects to proceed in the action." Where the ground relied upon on the motion to cancel is the unreasonable neglect "to proceed in the action," there the judge before whom the motion is made is called upon to exercise a legal discretion in determining whether or not he will grant the motion. In the other instances enumerated in the section (1674), if the action has been "settled, discontinued, or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired," then the defendant is entitled as matter of right to have the notice canceled.

The question, therefore, for our determination is whether the

judgment rendered in the ejectment action was a final judgment within the meaning of section 1674 of the Code. The learned judge at Special Term in discussing this question referred to the various sections of the Code of Civil Procedure relating to actions of ejectment and particularly to section 1525 which provides that "the court, at any time within three years after such a judgment is rendered, * * * upon payment of all costs, and all damages, * * * must make an order vacating the judgment, and granting a new trial in the action," and then said: "I am inclined to hold that a judgment which must be set aside on motion if made within three years, is not the final judgment specified in section 1674, and that the reason why a *lis pendens* is allowed to be filed, namely, to give notice of an attack upon the title, continues to have force until the suit can no longer be maintained."

Thus it appears that the view taken, that here there was not a final judgment, is based upon the fact that it is not conclusive upon the rights of the parties. To apply the latter test to a judgment, for the purpose of determining whether it is or is not the final judgment referred to in section 1674 of the Code, is giving to that section a construction which its language does not warrant and which under the authorities cannot be supported. In Black on Judgments (§ 21) it is said: "A final judgment means not a final determination of the rights of the parties with reference to the subject-matter of the litigation, but merely of their rights with reference to the particular suit." And in Freeman on Judgments (§ 16): "According to the common law rule by a final judgment is to be understood, not a final determination of the rights of the parties, but merely of the particular suit." And *Doorley v. O'Gorman* (31 App. Div. 216, 218; 27 Civ. Proc. Rep. 345) this court had occasion to examine into the history of the action of ejectment, and while not a direct authority upon the precise question here involved, it is instructive with respect to the view taken as to the nature of a judgment entered after a trial. Therein it was said: "At common law a judgment in an action of ejectment was not conclusive except as to the demise laid in that action, and as many other actions upon a new demise could be brought between the same parties as the plaintiff desired. (Adams Eject. 192, 315.) To prevent this endless litigation it was provided by the Revised Statutes

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that the judgment in an action of ejectment should be conclusive and it was given precisely the same effect as any other judgment between the parties (2 R. S. 309, § 36); but at the same time for the more satisfactory settling of titles and to prevent injustice because of surprise or an unforeseen failure of proof, the provisions for a new trial in certain cases as a matter of right were inserted in the statute. (2 R. S. 309, § 37.) This provision for a new trial was not, therefore, a restriction upon the rights of parties, but it was an enlargement of those rights. It was created by statute and depends entirely upon the statute for its existence and can only be granted in those cases in which the statute authorizes it to be done. The statute makes the granting of a new trial in these cases dependent upon the entry of a *final* judgment. That judgment may be for either of the parties, but when a *final* judgment has been entered, whether for the plaintiff or defendant, the statute gives to the party against whom the judgment is rendered the absolute right to a new trial upon payment of costs and certain damages. This right, accruing as it does at any time within three years after a *final* judgment is rendered in the action, expires when the new trial has been once granted."

As tending to show that there is no distinction in the binding force and effect of a judgment in ejectment and a judgment in any other class of actions, we have the cases of *Beebe v. Elliott* (4 Barb. 457) and *Gates v. Canfield* (2 Civ. Proc. Rep. 255).

There is no claim that the form of judgment entered in an action of ejectment should contain, nor is there any pretense that the judgment here involved did contain, any provisions which in that action required further litigation. So far as the parties to it were concerned, the judgment was final and was the termination of the action; and the fact that by other provisions of the Code of Civil Procedure a new trial might be had under certain conditions within three years did not continue the suit as a pending action. On the entry of the judgment, therefore, and after the plaintiffs' appeal had been dismissed for failure to prosecute it, the action in which the notice of *lis pendens* was filed had been terminated; and the fact that the judgment was subject to be set aside on certain conditions being complied with did not destroy its character as a final determination in that particular suit of the rights of the parties.

Our conclusion, therefore, is that the judgment which was here rendered in the ejectment action was a final judgment within the meaning of section 1674 of the Code of Civil Procedure, and the plaintiffs' appeal having been dismissed for failure to prosecute it, so that it became a binding judgment as to the rights of the parties in that particular action, the defendant, on motion, was entitled as matter of right to have the notice of pendency of action canceled. Accordingly the order appealed from should be reversed, with ten dollars costs and disbursements, and the motion granted, without costs.

PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred.

VAN BRUNT, P. J. (concurring):

I concur in this opinion, and also think that as matter of discretion the *lis pendens* ought to have been canceled.

Order reversed, with ten dollars costs and disbursements, and motion granted, without costs.

GRACE McDONALD, as Administratrix, etc., of JOHN F. McDONALD, Deceased, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Negligence — boy run over by a street car — when a charge that his negligence in getting upon the track would not defeat a recovery unless it was the proximate cause of the accident, is erroneous.

In an action brought to recover damages resulting from the death of the plaintiff's intestate, a boy twelve years of age, who was run over and killed by one of the defendant's street cars, the plaintiff gave evidence tending to show that the intestate fell upon the track when the car was some fifty feet distant, and that it could have been stopped within ten feet.

The court charged, at the request of the plaintiff and over the defendant's exception, "even if the jury believe that the boy carelessly or negligently ran or walked on the track, still such carelessness or negligence would not disentitle the plaintiff to recover *unless it was the proximate cause of the injury.*"

Held, that the charge was erroneous;

That the rule embraced therein is applicable only to those exceptional cases wherein it appears that after the initial danger resulting from the negligence of one or both of the parties, there was a second negligent act which was the proximate cause of the injury;

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That such rule was not applicable to the case at bar, as the presence of the boy upon the track and the subsequent operation of the car did not present two distinct situations based upon two distinct acts of negligence on the part of the motorman, but constituted a single situation or condition resulting in the accident.

APPEAL by the defendant, the Metropolitan Street Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of June, 1903, upon the verdict of a jury for \$3,800, and also from an order entered in said clerk's office on the 26th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Charles F. Brown, for the appellant.

Edmund L. Mooney, for the respondent.

O'BRIEN, J.:

This is an action to recover for injuries which caused the death of plaintiff's intestate alleged to have occurred through the negligence of defendant's motorman in charge of a Broadway north-bound car at Thirty-ninth street on December 15, 1895. The facts have been presented and considered in this court upon two former occasions (46 App. Div. 143; 75 id. 559) and passed upon by the Court of Appeals (167 N. Y. 66), a new trial being ordered on the first appeal on the ground that the question of contributory negligence was one to be determined by the jury and on the second appeal on the ground of error in the charge.

The question of fact involved is whether the boy who, at the time of the accident, was twelve years of age, ran immediately in front of the car after passing behind a south-bound car as claimed by defendant or whether he ran upon the track and fell while the car was some fifty feet away and was run over owing to defendant's negligence in the operation of the car. In support of the latter theory there was testimony that the car could be stopped in ten feet.

The court, at defendant's request, charged: "Reasonable care required of the deceased boy a vigilant use of his senses; he was bound to use his eyes and ears in attempting to cross the defendant's tracks so as to avoid collisions with cable cars, and if there was an omission of this care or duty on the part of the deceased boy which

contributed to the accident such omission was contributory negligence upon his part and the jury should find a verdict for the defendant." To this charge the plaintiff's counsel excepted and said: "In that connection I ask your honor to charge that even if the jury believe that the boy carelessly or negligently ran or walked on the track, still such carelessness or negligence would not disentitle the plaintiff to recover *unless it was the proximate cause of the injury.*" The court so charged and the defendant excepted. The jury returned a verdict in plaintiff's favor and from the judgment thus entered the defendant appeals.

The appellant insists that this charge was erroneous because it eliminated from the case the doctrine of contributory negligence; that the case did not present the facts necessary to bring it within the exception to the general rule, there being no *new act* of negligence shown on the part of the defendant that was the proximate cause of the accident. (*Csatlos v. Met. St. Ry. Co.*, 70 App. Div. 606; *Bortz v. Dry Dock, E. B. & B. R. R. Co.*, 78 id. 386.) In the latter case cited it was said: "The modification of the charge was an application to the concrete case of a rule with respect to contributory negligence which applies only in cases in which some new circumstance is introduced or new relation established, apart from the original act or omission constituting negligence, such new circumstance being the proximate cause of the injury sustained."

The respondent contends that the evidence herein, that the boy fell upon the track some forty or fifty feet ahead of the car and was struck by the car, although it might have been stopped within ten feet, permits the inference that the proximate cause was the negligence so to stop and that a new circumstance was thus presented, and hence the charge was applicable.

Both sides thus agree that the request charged was a statement of the rule of law applicable to those exceptional cases wherein it appears that after the initial danger resulting from the negligence of one or both of the parties, there was a second negligent act which was the proximate cause of the injuries. As said by this court in the *Csatlos Case* (*supra*), a good illustration of the application of the rule of law referred to was in the *Weitzman* case (*Weitzman v. Nassau El. R. R. Co.*, 33 App. Div. 585), where a child fell upon a fender of a car and after this culmination of the negligent

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act which resulted in his being there — assuming that it was the result of a negligent act on his part — he was carried along for a distance of from 32 to 150 feet; and it was held that from the moment of his falling into that position “a new relation existed between the parties and any act or omission on the part of the defendant amounting to a lack of the care demanded by the situation and resulting in the death of plaintiff's intestate is sufficient to charge the company with negligence.”

We do not think that the evidence herein, taking every inference which the respondent contends may be drawn therefrom, presents a case calling for the application of the rule of law embodied in the request charged. The fact that the boy fell upon the track forty or fifty feet ahead of the car did not eliminate from the case the doctrine of contributory negligence. Whether the car was a few feet or fifty feet away when the boy fell, the question of his contributory negligence was one of fact for the jury; and the evidence here shows that the presence of the boy on the track, the operation thereafter of the car until the boy was struck, did not present two situations entirely distinct and based on two distinct acts of negligence on the part of the motorman, but constituted a single situation or condition resulting in the accident. There was no new act of negligence after such a situation existed which was the proximate cause of the accident. The charge, therefore, which embodied a rule of law which was applicable only to a case like *Weitzman v. Nassau El. R. R. Co.* (*supra*) was erroneous, and there must be a new trial, and the judgment and order accordingly are reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., INGRAHAM, HATCH and LAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

EAST RIVER NATIONAL BANK, Appellant, *v.* THE CITY OF NEW YORK, Respondent.

City of New York—it is not liable upon certificates of indebtedness issued by the Flushing avenue improvement commission.

The act (Laws of 1878, chap. 410, as amd. by Laws of 1880, chap. 818; Laws of 1881, chap. 826; Laws of 1884, chap. 800) for the improvement of Flushing avenue, located within the corporate limits of Long Island City, which is now a part of the present city of New York, committed the performance of the work to certain persons designated therein, who were styled "the Flushing Avenue Improvement Commissioners."

The act provided that the cost of the improvement should, in the first instance, be met by certificates of indebtedness signed by the commissioners and countersigned by the treasurer and receiver of taxes of Long Island City; that such certificates of indebtedness should be paid out of assessments on the property benefited, which the commissioners were authorized to levy; that the assessments, which were made a lien upon the property assessed, should be paid to the treasurer and receiver of taxes of Long Island City; that if any assessment should remain unpaid for a period of eight years, the treasurer and receiver of taxes of Long Island City, "or such other officers as shall then be authorized by law to sell lands situate in said city for non-payment of city taxes," should sell the property assessed in the same manner as though the sale were for unpaid city taxes; that the treasurer and receiver of taxes of Long Island City should keep all moneys received by him on account of the assessments in a separate fund, and should use such funds for the sole purpose of paying the certificates of indebtedness; that he should be liable upon his official bond for the faithful discharge of the duties imposed upon him by the act; that if there should be any excess to the credit of the improvement fund after the payment of the certificates of indebtedness, it should be paid into the city treasury and applied in reduction of the city taxes levied upon the property assessed.

The statute contained no provision which, in express terms, made Long Island City liable for the payment of the certificates of indebtedness issued thereunder.

Held, that the improvement commission was not a duly authorized board of Long Island City; that no duty was imposed upon the city with respect to the improvement, and that it was not liable upon the certificates of indebtedness issued by the commissioners;

That, consequently, the city of New York was not liable upon such certificates under section 4 of the Greater New York charter (Laws of 1897, chap. 878), which provides that "all valid and lawful charges and liabilities now existing against any of the municipal or public corporations, or parts thereof, which by this act are made part of the corporation of The City of New York," should be paid by such city;

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That the duties imposed by the act upon any officer of Long Island City were not imposed upon him in his capacity as an officer of the city, but as a person designated in the act to perform the duties prescribed therein.

VAN BRUNT, P. J., dissented.

APPEAL by the plaintiff, the East River National Bank, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 13th day of July, 1903, upon the decision of the court, rendered after a trial at the New York Trial Term, a jury having been waived, dismissing the plaintiff's complaint.

Rollin M. Morgan, for the appellant.

George L. Sterling, for the respondent.

INGRAHAM, J.:

The action is brought to recover from the defendant, the city of New York, the amount of certain certificates of indebtedness issued by commissioners to open, widen and improve Flushing avenue, under chapter 410 of the Laws of 1878, as amended by chapter 318 of the Laws of 1880, and further amended by chapter 326 of the Laws of 1881, and chapter 300 of the Laws of 1884. These certificates are dated November 1, 1882, December 21, 1882, and March 13, 1886, were signed by the commissioners, countersigned by the treasurer and receiver of taxes of Long Island City with the seal of the Flushing avenue improvement commission. The complaint alleges that the Flushing avenue improvement commission was a duly organized board of Long Island City, established and existing under the first three acts of the Legislature specified. Section 1 of this act (as amd. by Laws of 1881, chap. 326) provides that certain persons named are appointed commissioners "without compensation, to open, widen and improve Flushing avenue from Van Alst avenue to the easterly boundary line of Long Island City. Said commissioners and their successors shall be known as the Flushing Avenue Improvement Commissioners. They shall act as a board of commissioners, and shall keep minutes of all their meetings and proceedings" and any vacancy existing may be filled by the remaining commissioners. By section 2 of the act (as amd. by Laws of 1884, chap. 300) the commissioners were authorized

to widen Flushing avenue to the full width and extent of eighty feet, to curb and flag said Flushing avenue and to lay bridge stones across all intersecting streets and avenues, and to construct any and all sewers, culverts, etc., along, under and across said Flushing avenue, and to cause suitable shade trees to be planted at proper distances along said avenue on each side thereof, and to pave or macadamize said Flushing avenue within said limits and to the full width of the roadway, before the expiration of four years from the 1st day of June, 1884. By section 3 (as amd. by Laws of 1880, chap. 318) the commissioners were authorized to acquire lands necessary for opening or widening the avenue. By section 4 (as amd. by Laws of 1880, chap. 318) all work to be done and all materials requisite to be furnished therefor involving an expenditure of more than \$100 at any one time were to be done and furnished by contract or contracts founded on sealed bids or proposals made on public notice by advertisement; and it was provided that "any contractor failing to perform his contract, or any part thereof, shall be liable to said commissioners for any damage caused by such failure, and said commissioners shall have full discretionary power, in the interest of the property owners, in the prosecution of the improvements in their dealings with the contractors, to enforce their rights against contractors by action or otherwise, to the end that said improvements may be completed in the most speedy, advantageous and economical manner." Section 5 (as amd. by Laws of 1881, chap. 326) provided: "In order to pay for the several improvements authorized or directed by this act, inclusive of such widening, together with the incidental expenses of making such improvements, said commissioners are hereby authorized and empowered to issue certificates of indebtedness in an amount not to exceed in the aggregate the sum of one hundred and fifty thousand dollars. Said certificates shall be known and designated as the Flushing avenue improvement certificates, and may be issued in direct payment for such improvements and expenses, or they may be sold or negotiated by the commissioners to obtain money to pay for such improvements, or any part thereof, as said commissioners may deem most advantageous. * * * The commissioners shall determine the form and denomination of such certificates, except that they shall be payable to bearer; shall

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pass by delivery; shall bear interest at a rate not exceeding six per centum per annum, payable semi-annually on the first day of February and August in each year; shall be redeemable out of the 'Flushing avenue improvement fund,' and shall be redeemable after five years and payable in any event in ten years from their respective dates; shall be receivable at all times at par and accrued interest in payment of any assessments hereby authorized, or of the interest thereon; and, also, except that it shall appear upon said certificates that they are issued under the provisions of this act. They shall be signed by said commissioners, or a majority of them, and countersigned by the treasurer and receiver of taxes of Long Island City, on the written requisition of said commissioners or a majority of them. * * * In case a sufficient amount of the assessments to be levied under the provisions of this act shall not be paid to the treasurer and receiver of taxes of Long Island City, to enable him to meet and pay the first six months' interest accruing upon any of such certificates which may have been issued from time to time by said commissioners, or any part thereof, the said treasurer and receiver of taxes shall certify the fact in writing to said commissioners, stating the amount necessary to pay or make up any deficiency in the payment of such interest, and thereupon said commissioners shall forthwith proceed to issue such an amount in such certificates as will make up and pay such deficiency of interest, and shall sell and negotiate the same as hereinbefore provided, and shall pay over the proceeds thereof to such treasurer and receiver of taxes, and such certificates so issued shall be issued and negotiated in the same manner and upon the same terms and conditions, and shall bear the same rate of interest as the improvement certificates hereinbefore provided for." Section 7 of the act (as amd. by Laws of 1881, chap. 326) directs the commissioners to proceed as soon as practicable to widen said Flushing avenue and to assess therefor the cost of the improvement authorized or directed to be made by the act, and that such assessment shall be levied upon and be a lien upon the property upon which it was imposed, and that "a just and valid assessment may be levied and collected therefor, so that the entire cost, charges and expenses of such widening and improvements may be defrayed out of, and with the proceeds of said assessment;" and that from and after the

time such assessment shall have been duly made, confirmed and filed in the office of the treasurer and receiver of taxes of Long Island City, the amount so assessed upon each lot, piece or parcel of land shall be a lien thereon," and "payment of the principal and interest of such assessments may be enforced in the same manner, by the same means, to the same extent, with the same force and effect, and within the same time or times after the filing of such assessment-roll in the treasurer's office of Long Island City, as is provided in regard to other assessments levied under the provisions of this act." Section 8 (as amd. by Laws of 1880, chap. 318) provides for the district of assessment for the opening, widening and improvements, and enacts that every assessment levied under the provisions of the act shall be a lien upon the real estate upon which the same shall be charged or levied from the time of the confirmation thereof and the delivery of the assessment roll, or a certified copy thereof, to the treasurer of Long Island City; that any assessment levied under the provisions of the act may be paid to the treasurer and receiver of taxes of Long Island City without fee or charge at any time within three months after the assessment roll therefor, or a certified copy thereof, shall be filed in the said treasurer's office, but "all lots, pieces or parcels of land upon which any assessment shall remain unpaid, and upon which assessment there shall be three years' interest or more unpaid on the first day of July in any year, or upon which assessment or interest, or any part thereof, shall remain unpaid after the expiration of eight years after such assessment shall have been confirmed and the assessment roll thereof, or a certified copy thereof, filed in the office of the treasurer and receiver of taxes of Long Island City, shall be advertised and sold for the payment of such unpaid interest or assessment, or both, as the case may be, and such sale or sales shall be made by the treasurer and receiver of taxes of said city, or such other officers as shall then be authorized by law to sell lands situate in said city for non-payment of city taxes, and such sale or sales and all proceedings therefor and thereafter shall be the same, and on the same notice and like terms and subject to the same conditions, provisions and restrictions, and the several lots or parcels of land or property sold may be redeemed, and in default of such redemption, title thereto shall be perfected and given in the same

* So in original.

manner, to the same extent, with the same force and effect, and the costs, fees, charges and expenses of such sale shall be the same as shall then be prescribed by law for the sale of lands situate in said city for the non-payment of city taxes in said city. At the sale of any lot, piece or parcel of land for non-payment of said assessments, or any of them, or interest thereon, as hereinbefore provided, it shall be the duty of the officer making such sale, to receive the said improvement certificates, authorized by this act, at par and accrued interest in payment for the assessments, or any of them, and the accrued interest thereon, for which such sale shall be made, exclusive of the costs and expenses of such sale, in the same manner, to the same extent and with the same force and effect; and such certificates when so received, shall be permanently and effectually canceled and defaced by and deposited with the same office." Section 9 of the act (as amd. by Laws of 1880, chap. 318) provides as follows: "All moneys received by said treasurer and receiver of taxes in payment of such assessments or interest shall be placed to the credit of a fund to be known as the Flushing avenue improvement fund, and shall be kept separate and apart from all other moneys in his hands, and no part thereof shall be expended by him except in payment of the interest or for the purchase or redemption of the principal of said Flushing avenue improvement certificates, or such additional certificates as hereinbefore provided, until the same shall be fully paid, purchased or redeemed, with interest as aforesaid. Whenever the treasurer of said city shall have five hundred dollars or more in his hands to the credit of said Flushing avenue improvement fund not required for the redemption of such additional certificates, or for the next semi-annual interest payment on outstanding improvement certificates, he shall give public notice, by advertisement for at least one week in one or more newspapers published in Long Island City, that he will receive sealed proposals for the sale and surrender to him of such certificates. Such notice shall specify the amount in his hands to be then applied to the purchase of such improvement certificates. * * * In case the amount of improvement certificates so advertised for shall not be purchased pursuant to said advertisement, said treasurer is hereby authorized to call in the amount so advertised for, or the residue thereof as nearly as may be, not so purchased, by public notice, by

advertisement to be published in one or more newspapers published in Long Island City, once a week for two consecutive weeks, which notice shall specify the number, par value and date of each certificate so called in and shall require the same to be presented at his office for redemption. * * * When all of said assessments shall have been paid with interest thereon, or upon the completion of the sales for the non-payment thereof, all the said improvement certificates shall be paid off. Final notice of the redemption of such certificates, by advertisement to be published in one or more newspapers, published in Long Island City, once a week for two consecutive weeks, shall be given by said treasurer, requiring all outstanding certificates to be presented at his office for redemption. * * * If there shall be any excess to the credit of said improvement fund, after the payment and redemption of such certificates, it shall be covered into the city treasury in payment of city taxes, upon the property assessed hereunder in proportion to the total amounts assessed thereon, respectively." Section 11 of the act provides that "the treasurer and receiver of taxes of Long Island City and his sureties shall be liable on his official bond given to said city, after the passage of this act for the faithful discharge of the several duties hereby imposed upon him, and for all moneys which shall come into his hands under and pursuant to the provisions hereof. Prior to the giving of such security, a temporary bond may be required by said improvement commissioners in form and amount to be approved by them, conditioned that said treasurer will faithfully account for, apply and pay over all moneys which shall come into his hands under the provisions of this act."

I have called attention to the provisions of this act, to show that the commission was not "a duly organized board of said Long Island City," and that there was no duty in relation to this improvement imposed upon the city. The Legislature by the act specified the improvement to be made; appointed commissioners under whose direction such improvement was to be made. To provide the necessary money the commissioners were directed to issue the certificates, to receive the money realized therefrom and disburse it; and an assessment was provided for from which the certificates issued by the commissioners were to be paid; and the duty was imposed upon the treasurer of Long Island City to receive the

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amount of the assessment when paid by the owners of property upon which the assessment was imposed, which he was directed to keep in a separate account, distinct from all city moneys, and apply to the payment of the certificates issued by the commissioners; and to insure the performance of that duty he was required to give a bond; and the money so received was to be solely applicable to the payment of the certificates issued.

There is no provision of this act which in express terms makes the city liable for the payment of these certificates. The provision of section 8 (*supra*), directing the sale of the property does not impose a duty upon the city to make such sale. It directs that such property upon which an assessment or interest shall remain unpaid, after the expiration of eight years from the confirmation of the assessment, and the filing of the assessment roll, or a certified copy thereof, as specified, shall be advertised and sold for the payment of such unpaid interest or assessment, or both, as the case may be; and such sale or sales was or were directed to be made by the treasurer and receiver of taxes of said city, or such other officer as should then be authorized by law to sell land situate in said city for the non-payment of city taxes. Here, again, the officer who is to make such sale is designated by the Legislature, and in making such sale he would act under this specific power given to him by the Legislature and not by virtue of any authority that he had as an officer of the city; and then in case there should be any excess of the amount necessary to pay the certificates the amount is not to be paid over to the city for its benefit, but is to be applied to the reduction of the payment of taxes upon property that had been assessed for the improvement by the legislative mandate. (§ 9, *supra*.) The sole duty that rested on any city official was that which was imposed by the act upon the officer, not as a corporate officer, but as a person designated by the act to perform the duties prescribed by the act.

When the city of New York was consolidated with the other municipal corporations in what was called the Greater New York, there was imposed upon the new city created a liability for "all valid and lawful charges and liabilities now existing against any of the municipal or public corporations, or parts thereof, which by this act are made part of the corporation of The City of New York,

* * * which but for this act would be valid and lawful charges or liabilities against the same," and such charges and liabilities "shall accordingly be defrayed and answered unto by it to the same extent, and no further, than the said several constituent corporations would have been bound if this act had not been passed." (N. Y. charter [Laws of 1897, chap. 378], § 4.) Section 5 of the charter provides: "All laws or parts of laws heretofore passed creating any debt or debts of the municipal and public corporations, united and consolidated as aforesaid, or for the payment of such debts, or respecting the same, * * * shall remain in full force and effect, except that the same shall be carried out by the corporation hereby constituted, to wit: The City of New York. * * * All the valid debts of the municipal and public corporations mentioned in the first section of this act, * * * shall be the common debt of The City of New York, as hereby constituted." Section 9 of the charter provides that "all funds and moneys which, on the first day of January, eighteen hundred and ninety-eight, shall be held by or be payable to * * * any officer of any of the municipal and public corporations, or parts of municipal and public corporations, hereby consolidated with the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York, as well as all funds and moneys then held by or payable to any officer of said last-named corporation, shall be deemed to be held by and be payable to the corporation of The City of New York, constituted by this act."

These provisions carefully restrict the obligation which is imposed upon the city of New York to the debts or obligations of the various municipal corporations that are included in the city thereby created. There is no provision of the charter that I have been able to discover, or to which our attention has been called, which imposes upon the city of New York a liability for an indebtedness created or authorized by the Legislature which is not an obligation of one of the municipalities which were consolidated into the city of New York.

Section 9 of the charter, to which attention has been called, providing that all funds and moneys which on the 1st day of January, 1898, shall be held by or be payable to any officer of any of the municipal and public corporations consolidated, shall be held by and

be payable to the city of New York, evidently applies to the moneys of the constituent corporations, or moneys due to such corporations, and payable to their officers. Here no part of these assessments ever became payable to Long Island City, nor could they in any way be applied for its benefit. The municipal corporation had no control over the proposed improvement, the receipt or expenditure of the money raised to carry out the improvement, or the receipt or application of money realized from the assessment which the commissioners imposed for the improvement.

The only fact that connects Long Island City in any way with the improvement is that it would appear that the avenue to be improved or a part of it was within the corporate limits, and the treasurer of the city was designated as the fiscal officer who was to receive the amount of the assessments when paid and apply it as directed in the act.

It seems to me that the Legislature imposed no obligation upon the municipal corporation of Long Island City which could be enforced by action to pay these certificates, and no such obligation was imposed upon the defendant when the new city was created. It is not necessary to determine upon this appeal whether or not the defendant would be responsible for a failure of the city treasurer of Long Island City to sell the lands upon which an assessment had been imposed as directed by the act. I should have serious doubts as to whether the city of New York would be responsible for any default of the treasurer before the 1st of January, 1898, when the defendant was created. The theory upon which the action was brought was that the commission was a duly organized board of Long Island City and that city was bound to pay these certificates when they became due, and that such obligation having existed at the time of the consolidation of the various cities into the city of New York, it was imposed upon the defendant by the provisions of the charter, and thereby the defendant became liable to the holders of the certificates. I can find no warrant for such a claim. None of the cases cited by counsel for the plaintiff have any application. There is a clear distinction between the cases where the city is directed to make the improvements, to enter into contracts therefor and issue obligations to provide the money to pay for the work done, and is authorized to impose assessments to reimburse itself for the money thus expended,

or which it had become obligated to pay, and this case, where the city had nothing to do with the improvement, and incurred no obligation therefor.

I think, therefore, that the complaint was properly dismissed, and that the judgment should be affirmed, with costs.

PATTERSON, McLAUGHLIN and HATCH, JJ., concurred; VAN BRUNT, P. J., dissented.

Judgment affirmed, with costs.

CHARLES CYRUS MARSHALL, Respondent, *v.* UNITED STATES TRUST COMPANY OF NEW YORK and JAMES J. WILLIAMS, Individually and as Executors of and Trustees under the Last Will and Testament of MARY A. FLANAGAN, Deceased, Appellants, Impleaded with WILLIAM C. FLANAGAN.

Will directing the executors thereof to pay a mortgage upon property in which the testator's son has a life estate — purchase of the property by the executors upon a foreclosure of the mortgage — when they acquired a good title as against judgment creditors of the son who were parties to the foreclosure action.

March 19, 1895, Mary A. Flanagan executed her will, by which she directed her executors to sell a parcel of land known as the Mott avenue property and invest the proceeds of such sale and to pay the net income of all her property and of all bonds, mortgages and other investments to her son, William C. Flanagan, during his life.

The will further provided: "*Twentieth.* I empower my said executors to pay off any mortgage on my real estate at Avenue B and Fourteenth Street with any funds which they may have in their hands from the sale of any other portion of my estate, and for said purpose to sell or dispose of for cash any other property in their hands."

November 10, 1896, the said Mary A. Flanagan conveyed to her son, William C. Flanagan, a life estate in the property on the corner of Fourteenth street and Avenue B, subject to the following conditions: "*First,* that the said party of the second part shall have the power to receive the rents, issues and profits of said premises during the term of his natural life. *Second,* that said party of the second part shall, during the term of his natural life, make and do any and all repairs upon said premises in good and sanitary condition, pay all taxes, croton water rents and assessments which may be laid or levied upon said premises, and shall comply with any and all ordinances of the City of New York and perform any and all directions or orders of the Board of Health, Fire, or other departments of said City which shall be empowered by law to

make the same. *Third*, should said party of the second part die leaving him surviving issue, or issue of a deceased child or children, then said premises shall be and become the property in fee of said issue *per stirpes* and not *per capita*. *Fourth*, should said party of the second part die intestate and leave a widow him surviving, but no issue or issue of a deceased child or children, then said widow shall be entitled to one-third part of said property. *Fifth*, should said party of the second part die intestate, leaving him surviving no widow or issue or issue of a deceased child or children, then said premises are to revert to and belong and be disposed of as part of the estate of the party of the first part and to be distributed in accordance with the last will and testament, if any, of the said party of the first part. *Sixth*, said party of the second part shall have no power or authority to sell, mortgage or otherwise encumber, or suffer to be sold, mortgaged or encumbered any part of said premises."

The property conveyed was then subject to the lien of a \$12,000 mortgage.

November 20, 1896, said Mary A. Flanagan executed a codicil to her will, by which she directed her executors to sell the Mott avenue premises as provided in the will. The codicil contained the further provision: "*Fifth*. I hereby direct my executors hereinafter named to pay out of the moneys realized upon the sale of my property on the easterly and westerly sides of Mott Avenue any mortgage upon the premises situate on the southwest corner of Avenue B and 14th Street, whether the same be owned by me at time of my death or shall have been transferred to my said son, but not otherwise."

Mary A. Flanagan died December 15, 1896, seized of the Mott avenue property, and the will and codicil were duly admitted to probate.

April 14, 1897, William C. Flanagan leased the property on the corner of Fourteenth street and Avenue B to one Mullen for a term of ten years. He subsequently formed a partnership with Mullen under an agreement which provided that the lease should become an asset of the partnership. The partnership failed and judgments were obtained against Flanagan and Mullen. In January, 1898, the trustees under the will of Mary C. Flanagan sold the Mott avenue property, receiving therefor more than sufficient to pay the mortgage on the Avenue B property. Thereafter, an attorney, acting in the interest of William C. Flanagan, informed the executors and trustees under the will that Flanagan had no further interest in the property, and that under the will the trustees could not pay off the mortgage thereon.

In consequence of this notice, the trustees did not pay off the mortgage, and an action was commenced to foreclose it. Both Flanagan and his judgment creditors and also the trustees were made parties to the foreclosure action. The executors and trustees purchased the property at the foreclosure sale with funds belonging to the estate. They subsequently sold the property, receiving therefor the sum of \$21,000.

In an action brought by a judgment creditor of William C. Flanagan to have the income of such \$21,000 applied on his judgment, upon the theory that it was the duty of the trustees to pay off the mortgage and thus prevent the foreclosure, it was

Held, that it was not clear whether the direction in the will that the executors pay off the mortgage had become operative;

That, aside from this question, the trustees, by the conveyance from the referee in the foreclosure action, acquired an absolute title to the property, free from any claim on the part of Flanagan or his judgment creditors, who had been made parties to the action;

That, if the trustees were bound to pay the mortgage and thus release the property from the lien thereof, Flanagan and those claiming under or through him should have asked for that relief in the foreclosure action.

APPEAL by the defendants, the United States Trust Company of New York and another, individually and as executors of and trustees under the last will and testament of Mary A. Flanagan, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of January, 1904, upon the decision of the court rendered after a trial at the New York Special Term.

Edward W. Sheldon, for the appellants.

John M. Harrington, for the respondent.

INGRAHAM, J.:

By this action the plaintiff, a judgment creditor of the defendant William C. Flanagan, seeks to have his judgment against the defendant Flanagan established as a lien upon a life estate in certain real property which had vested in Flanagan, the title to which is now held by the defendants the United States Trust Company and James J. Williams, as executors and trustees under the last will and testament of Mary A. Flanagan, deceased. There is no substantial dispute as to the facts. The property in question was owned by the appellants' testatrix prior to the 19th day of March, 1895. On that day she executed her will, by which she directed her executors to sell a certain parcel of land on Mott avenue, to invest all moneys received therefrom, and to pay the net income of all her property and of all bonds, mortgages and other investments to her son William C. Flanagan during his life. The said will also contained the following provision: "*Twentieth*: I empower my said executors to pay off any mortgage on my real estate at Avenue B and Fourteenth Street with any funds which they may have in their

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hands from the sale of any other portion of my estate, and for said purpose to sell or dispose of for cash any other property in their hands."

Subsequent to the execution of this will, and on the 10th day of November, 1896, Mary A. Flanagan executed an instrument by which she granted and released unto William C. Flanagan, the party of the second part, a lot of land on the southwest corner of Fourteenth street and Avenue B "for and during the term of his natural life, with the powers and subject to the provisions hereinafter limited, declared and expressed concerning the same. *First*, that the said party of the second part shall have the power to receive the rents, issues and profits of said premises during the term of his natural life. *Second*, that said party of the second part shall, during the term of his natural life, make and do any and all repairs upon said premises in good and sanitary condition, pay all taxes, croton water rents and assessments which may be laid or levied upon said premises, and shall comply with any and all ordinances of the City of New York and perform any and all directions or orders of the Board of Health, Fire, or other departments of said City which shall be empowered by law to make the same. *Third*, should said party of the second part die leaving him surviving issue, or issue of a deceased child or children, then said premises shall be and become the property in fee of said issue *per stirpes* and not *per capita*. *Fourth*, should said party of the second part die intestate and leaving a widow him surviving, but no issue or issue of a deceased child or children, then said widow shall be entitled to one-third part of said property. *Fifth*, should said party of the second part die intestate, leaving him surviving no widow or issue or issue of a deceased child or children, then said premises are to revert to and belong and be disposed of as part of the estate of the party of the first part and to be distributed in accordance with the last will and testament, if any, of the said party of the first part. *Sixth*, said party of the second part shall have no power or authority to sell, mortgage or otherwise encumber, or suffer to be sold, mortgaged or encumbered any part of said premises." This instrument was recorded in the office of the register of the city and county of New York on December 8, 1896. At the time of the execution and delivery of this instrument the premises affected thereby were subject to the lien of a mortgage

to secure the payment of the sum of \$12,000 on the 4th day of July, 1896.

Subsequently, and on the 20th of November, 1896, the appellants' testatrix executed a codicil to her last will and testament whereby she directed her executors to sell her Mott avenue property as provided in the 8th clause of her will. The said codicil also contained the following provision: "*Fifth.* I hereby direct my executors hereinafter named to pay out of the moneys realized upon the sale of my property on the easterly and westerly sides of Mott Avenue any mortgage upon the premises situate on the southwest corner of Avenue B and 14th Street, whether the same be owned by me at time of my death or shall have been transferred to my said son, but not otherwise."

Mary A. Flanagan died on December 15, 1896, and the will and codicil were admitted to probate by the surrogate of the city and county of New York as a will of the real and personal property, and letters thereon were issued to the appellants as executors. She died seized of the Mott avenue property, which the appellants have sold as directed by the will and codicil. On April 14, 1897, the defendant Flanagan leased the Avenue B property, in which he had a life estate under the instrument before described, to one Mullen for the term of ten years from May 1, 1897; and on April 29, 1897, Flanagan and Mullen formed a copartnership. By the copartnership agreement, the said lease from Flanagan to Mullen was to become an asset of the copartnership. The said copartnership was unsuccessful and failed in business, and judgments were obtained by the plaintiff's assignor and others against Flanagan and Mullen during the year 1897. In the month of January, 1898, the executors and trustees under the will sold the Mott avenue property belonging to the estate of the testatrix and received therefor \$43,725, of which, after making certain payments directed by the will, there remained in their hands an amount in excess of the \$12,000 required to pay the mortgage on the Avenue B property in which the defendant Flanagan had been granted a life estate.

The defendant Flanagan, who was called as a witness for the plaintiff, testified that he consented to have the mortgage upon the premises in which he held a life estate foreclosed. Mr. Fox testified that he acted as attorney for the defendant Flanagan; that he

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met the attorney for the trust company and told him not to pay the mortgage of \$12,000 on the Avenue B property, on the ground that the defendant Flanagan had no interest in the property, and that the mortgagees might foreclose and let the property be sold under foreclosure, and that this advice was given at the request of Flanagan. The attorney for the trust company testified that Mr. Fox, as Flanagan's attorney, requested the trustees not to pay off this mortgage; that he stated that Flanagan had parted with his interest in the property; that by certain copartnership articles with Mullen the lease had become copartnership property and that judgments had been obtained against both Flanagan and Mullen, and that as Flanagan had no further interest in the property the trustees could not under the will pay off the mortgage; that in consequence of this notice from Flanagan's attorney, the trustees did not pay off the mortgage, whereupon an action was commenced to foreclose the mortgage, a judgment of foreclosure and sale entered, the property sold thereunder and purchased by the appellants as trustees under the will of Mrs. Flanagan, who received a conveyance of this property from the referee under the judgment of foreclosure, and paid for the property out of the money of the estate in their hands which they held in trust under the provisions of the will. The appellants subsequently sold this Avenue B property, which they had purchased at the foreclosure sale on the 28th of February, 1899, for the sum of \$21,000, receiving upon such sale \$5,000 in cash and a bond of the purchaser secured by a mortgage for \$16,000. Subsequently the said mortgage and interest were paid to the said executors.

The court below found that "said defendant executors and trustees, at the request of defendant William C. Flanagan and with intent to defeat the collection of said judgment now owned and held by plaintiff, and in violation and disregard of the directions contained in the last will and testament and codicil thereto, and in violation and disregard of the rights and interests of said Flanagan's creditors, including plaintiff's predecessors in title, failed, neglected and refused to pay off said mortgage to said Charles Kinken upon the said premises situated on the southwest corner of Fourteenth Street and Avenue B, and suffered the same to be foreclosed and bought in the said premises as hereinafter more fully set forth;"

that "the funds of the estate of said Mary A. Flanagan, deceased, including the moneys arising on the sale by them of said Avenue B and Fourteenth Street property, have been intermingled in the hands of defendant trustees; that from the fund of \$15,817.32, the income of which is applicable to the payment of the plaintiff's judgment against the defendant William C. Flanagan, as hereinafter set forth, income has been received by the defendant trustees as follows," which income amounts to \$551.91.

As conclusions of law the court held: "I. That as between the defendant executors and trustees and the defendant Flanagan, upon the said purchase with funds of the said trust estate on the said foreclosure sale by the defendant executors and trustees of the premises situated on the southwest corner of Fourteenth Street and Avenue B in the City of New York, the said defendant William C. Flanagan, by virtue of his interest under the said deed and the direction of the said codicil to pay off the said mortgage on the property became restored to an estate for the term of his natural life in the said premises subject to certain deductions properly chargeable against said life tenant in the premises. II. That upon the said sale of the said premises by the defendant executors and trustees to Harris Mandelbaum and Fisher Lewine the defendant William C. Flanagan became the owner of an estate for the term of his natural life in the fund of \$21,000, as representing his interest in the said premises before foreclosure under the said deed to him taken together with his right under the said will and codicil to have the mortgage thereon paid off, subject to certain deductions hereinafter mentioned properly chargeable against said life tenant in the premises. * * * VI. That \$15,817.32 is the amount of the fund to which said defendant Flanagan's life estate now attaches in the premises. VII. That the plaintiff's preferential lien upon the income of the said fund of \$15,817.32 attached at the commencement of this action on November 25, 1902, and that plaintiff was not bound to join any other creditor as a party to this action. VIII. That plaintiff should be paid out of the interest, income, issues and profits of said fund of \$15,817.32 the amount remaining unpaid on his said judgment, to wit, \$615.19, together with interest thereon from the 28th day of October, 1897, and the costs of this action." And the defendant trustees were ordered and directed to

pay the net income realized by them upon the said fund since the commencement of the action, and to pay the subsequently accruing income as received to the plaintiff or his attorney during the term of the natural life of the defendant Flanagan until the money payable to the plaintiff herein should have satisfied the judgment; and the defendant trustees were enjoined and restrained from paying the defendant Flanagan, or to any one except the plaintiff or his attorney, any part of such net interest, income, issues and profits arising from the said fund of \$15,817.32 during the term of the natural life of the defendant Flanagan until the moneys payable to the plaintiff as directed should have been fully paid and satisfied; and judgment was entered in accordance with this direction, and from this judgment the defendant trustees appeal.

By this action the plaintiff seeks to have applied to the payment of his judgment the interest of the judgment debtor in this Avenue B property. By the grant to the judgment debtor he became the owner of an estate for life in the Avenue B property, subject to a mortgage of \$12,000, and interest thereon. As such life tenant he was required to pay taxes, assessments and charges upon the property. That life estate undoubtedly became property in his hands to which the lien of a judgment would attach, and it was subject to the payment of his debts. The 5th clause of the codicil to Mrs. Flanagan's will directed her executors to pay, out of the money realized upon the sale of the Mott avenue property, any mortgage upon the premises in question if she owned the property at the time of her death or if it had been transferred to her son. It was not their duty to pay until they had realized sufficient money out of the sale of the Mott avenue property. The court found that during the month of January, 1898, the executors sold the Mott avenue property belonging to the estate, as directed by the 8th clause of the will, in several lots or parcels, for sums amounting in the aggregate to \$43,725. Just when the money was received upon this sale does not appear. On the 14th day of April, 1897, before the Mott avenue property had been sold, Flanagan had leased the Avenue B property to Mullen as tenant for ten years from May 1, 1897, at a yearly rent of \$2,200 for the first five years, and \$2,300 for the remainder of the term; and on the 29th of April, 1897, Flanagan and Mullen entered into a copartnership agreement to

conduct a restaurant and saloon business upon the premises in question. It was agreed that the lease of Flanagan to Mullen of the premises should become copartnership assets. This copartnership was to continue for ten years, the term of the lease. Mullen contributed the sum of \$1,500 in cash and his experience in the business, and Flanagan contributed \$1,500 and the rents, issues and profits arising from the said premises leased. It was also agreed that the condition of the lease as to the payment of the rents by Mullen should become null and void and said rents should become copartnership property, notwithstanding the condition expressed in said lease for the payment of rent, and that the same was to be used, laid out and employed in common between them for the management of the said restaurant and saloon business; and it was further agreed that "all such gains, profits and income shall come, go out or arise for or by reason of the said trade or joint business as aforesaid, the rents from the said premises shall be from time to time, during the said term, equally and proportionately divided between them, the said copartners, share and share alike;" and also that all of such losses that shall happen in the said joint trade should be paid and borne equally and proportionately between the partners.

By the lease to Mullen and the copartnership agreement, this property for the term of the lease undoubtedly became copartnership property; and this was the condition of the property when the duty devolved upon the trustees to pay off the mortgage which was then upon the property. In the meantime the business had been unsuccessful. The firm had failed and judgment had been obtained against the copartners. The lease, however, for the term of ten years was copartnership property and subject to the debts of the copartnership. The direction in the will of Mrs. Flanagan which then became operative was to pay this mortgage, "whether the same be owned by me at time of my death or shall have been transferred to my said son, but not otherwise;" and this condition existed when the trustees were directed by Flanagan not to pay the mortgage as the condition contemplated by the will did not then exist. It is not entirely clear that this direction to pay the mortgage became operative. Prior to making this codicil Mrs. Flanagan had granted the estate to the defendant Flanagan for life, with remainder to his issue, and with a reversion, in the event of

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his dying without issue and unmarried, to her estate. It is clear that at the time this provision of the will became operative the premises were not owned by her and had not been transferred to her son. His interest in them was simply a life estate with remainder over, and he had transferred his interest in the property for a term of ten years. When the will was made this grant of the property was in existence, and this limitation upon the direction of the executors to pay the mortgage upon the property must be read in connection with the condition in which the property stood at the time the will was executed. Mrs. Flanagan could have contemplated that by the death of her son before her, without issue and without having been married, the property would revert to her and at the time of her death be a portion of her estate; but it is not clear that she intended that her executors should pay off that mortgage regardless of the condition of the property at the time of her death, or the interest that she should own or that her son should have in it at that time; and I do not think that, because these trustees, acting upon a notice received from the son's legal adviser that the situation was such as was not contemplated by the will, and that, therefore, they were not justified in paying the mortgage, their failure to pay the mortgage can be fairly said to be the result of a combination to defeat the collection of the plaintiff's judgment and in violation and disregard of the directions contained in the will and codicil, and in violation and disregard of the rights and interests of Flanagan's creditors, including plaintiff's predecessors in title.

The mortgage not having been paid, the mortgagee commenced proceedings to foreclose it, alleging non-payment. To that action the trustees and Flanagan and the holder of the plaintiff's judgment and the other judgment creditors were parties. The mortgage was a lien upon Flanagan's interest in this property, he having a life estate therein, and by the judgment in the foreclosure action it was decreed that the mortgage was a lien upon the property and that the property should be sold to satisfy the mortgage. Whatever rights Flanagan had in that property, and whatever rights or interests the plaintiff as Flanagan's judgment creditor had therein, were subject to the mortgage; and when by the judgment in the foreclosure action it was determined that the property should be sold and conveyed to the purchaser upon the sale, it was the plaintiff's

as well as Flanagan's interest in the property that was sold, and there passed to the purchaser at that sale an absolute title to the property, discharged of all claim by either Flanagan or the plaintiff or the owner of the plaintiff's judgment therein. It is true that the executors became the purchasers at the sale under that judgment, but they then purchased Flanagan's interest and the plaintiff's interest in the property, and the sum realized on that sale stood in lieu of the property itself, and the purchaser at the sale acquired a valid title, discharged of all claim that Flanagan or his issue, or those claiming under him who were parties to the action, were entitled to under the grant.

Section 1632 of the Code of Civil Procedure provides that "a conveyance upon a sale made pursuant to a final judgment in an action to foreclose a mortgage upon real property vests in the purchaser the same estate only that would have vested in the mortgagee if the equity of redemption had been foreclosed. Such a conveyance is as valid as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section." The conveyance by the referee to the executors and trustees, therefore, was, by force of the statute, an entire bar to any claim of the plaintiff as a judgment creditor of Flanagan in and to any part of this property purchased and conveyed under the judgment, and there vested in the appellants an absolute title to the property, discharged of all claim by Flanagan or any one claiming under him who was a party to the action. These parties were all before the court. If the executors were bound to pay this mortgage and thus release the property from the lien thereof, either Flanagan or those claiming under or through him could in that action have asked for a judgment requiring the executors to pay the mortgage, and thereby have freed the interest of their judgment debtor from the lien of the mortgage. No such application was made, and I think it clear that the title of the trustees to this property could not be subjected to any claim of Flanagan or any one claiming under him who was a party to that action and whose interest in the property was conveyed by the referee to the appellants.

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The authorities sustain this conclusion. In *Rector, etc., Christ P. E. Church v. Mack* (93 N. Y. 488) it was said: "The effect of the foreclosure deed, therefore, as determined by the statute is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage and unaffected by the subsequent incumbrances and conveyances of the mortgagor. * * * The statute allowed her to be a purchaser, and in determining the effect of the foreclosure deed its terms draw no distinction among purchasers. It does not discriminate. Whoever may lawfully purchase becomes the purchaser, whose title is described and determined." In *People ex rel. Short v. Bacon* (99 N. Y. 275) it was said: "The relator's lien or right, whatever it may have been, upon the land or interest of the mortgagor or judgment debtor was subsequent to the mortgage. * * * They were parties to the foreclosure, and the conveyance in pursuance of it was an entire bar against them as well as against the mortgagor. Neither could after that have any right or interest in the equity of redemption" (See, also, *Nutt v. Cuming*, 22 App. Div. 92; 155 N. Y. 309.)

It follows that the judgment must be reversed; and as it appears from the undisputed facts that the plaintiff is not entitled to any relief, the complaint is dismissed, with costs.

VAN BRUNT, P. J., O'BRIEN, McLAUGHLIN and HATOH, JJ., concurred.

Judgment reversed and complaint dismissed, with costs.

THE INDUSTRIAL AND GENERAL TRUST, LIMITED, Plaintiff, v.
J. KENNEDY TOD and Others, Defendants.

Reorganization agreement — liability of the committee created thereby for a failure to fix the plan of reorganization prior to a mortgage foreclosure sale at which it purchases the property — where no damage is shown by a bondholder who has deposited his bonds thereunder — his failure to withdraw his bonds from deposit after notice of the filing of the plan of reorganization — proof of facts, arising after the bringing of the action, alleged in the pleading.

A railway corporation, having made default in the payment of the interest due on bonds secured by a mortgage upon its property, the trustee named in the

mortgage instituted a suit for the foreclosure thereof, and a receiver *pendente lite* of the mortgaged property was appointed. April 9, 1895, during the pendency of the foreclosure action, a reorganization agreement was executed by the terms of which a committee was appointed to represent the bondholders. The agreement provided that the bonds should be deposited with the Manhattan Trust Company, "subject to the order and full control of the committee, to be used for any purposes under this agreement. The deposit of such bonds shall transfer to the committee the full legal and equitable title thereto for all the purposes of this agreement;" that "the committee is hereby expressly authorized and empowered, and it shall be its special duty to prepare and adopt a plan for the reorganization of the affairs of the railway company, with or without foreclosure. When the committee shall have adopted such plan, a copy thereof shall be lodged with the Manhattan Trust Company. Notice shall thereupon be given to the holders of the trust certificates issued hereunder, and such plan shall become binding upon all of the said holders who do not withdraw herefrom (in the manner hereinafter provided), unless the holders of a majority in interest of the said certificates shall, within twenty days after such notice, file with the Manhattan Trust Company their written dissent from the plan;" that "any holder of a trust certificate issued hereunder may, at any time within thirty days after the mailing to him of notice of the filing of a plan of reorganization, as hereinbefore provided, withdraw from this agreement and recover back the bond or bonds deposited by him upon payment of his *pro rata* share of the expenses theretofore incurred by the committee;" that the committee, for the purpose of effecting a reorganization of the affairs of the railroad company, might take such steps as it might deem advisable for the formation of a new corporation and for transferring to the new corporation all the assets of the railway company; that it might "use the deposited bonds for the purpose of paying for any assets or franchises purchased;" that "the committee may supply any defects or omissions which it may deem necessary to be supplied to enable it to carry out the general purpose of this agreement. The committee is authorized to construe this agreement and its construction shall be final;" that no member of the committee should be liable for "anything but his own willful misconduct."

The agreement contained no express provision as to the time when the plan of reorganization should be filed by the committee.

July 16, 1895, the chairman of the reorganization committee, in reply to the request of The Industrial and General Trust, a bondholder which had deposited its bonds under the reorganization agreement, informed such bondholder that the property would be sold September 16, 1895, and that no plan of reorganization had then been adopted and that he was unable to predict the probable date upon which a plan would be issued.

September 16, 1895, the reorganization committee bid in the mortgaged property. Thereafter the reorganization committee caused the incorporation of a new railroad company, and procured the mortgaged property to be conveyed to it, part of the purchase price being paid in cash and part by the use of bonds deposited under the reorganization agreement. All of the stock and

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securities of the new railroad company were issued to the reorganization committee.

In July, 1898, a plan of reorganization was filed and notice thereof was given to all the bondholders as provided in the reorganization agreement. The Industrial and General Trust, the bondholder before referred to, did not, upon receiving notice of the filing of the plan of reorganization, withdraw the bonds deposited by it, as provided in the reorganization agreement.

In an action brought by The Industrial and General Trust against the reorganization committee to recover damages for an alleged breach of the reorganization agreement, based upon the failure of the committee to file the plan of reorganization prior to the sale of the mortgaged property in the foreclosure action, it was

Held, that the complaint was properly dismissed;

That the reorganization agreement contained no provision, either express or implied, that the plan of reorganization should be filed prior to the sale in foreclosure;

That, assuming that the failure of the committee to file the plan of reorganization prior to the sale did constitute a breach of the reorganization agreement, the plaintiff could not recover damages in this action, as the committee having acquired all of the mortgaged property, it did not appear that the plaintiff's proportionate share of the securities of the new company was not as valuable as the bonds which it had deposited with the reorganization committee, and that, consequently, the plaintiff had not shown that it had sustained any damages from the alleged breach;

That the complaint was also properly dismissed, because the plaintiff, by failing, upon receiving notice of the filing of the plan of reorganization, to withdraw its bonds in the manner provided in the reorganization agreement, had assented to such plan.

The rule that, in an action at law, the rights of the parties must be determined as of the time when the action was commenced, is subject to exceptions, one of which is that where a fact has arisen subsequent to the joinder of issue, which either increases, diminishes or extinguishes the right of recovery, such fact may be proved if the same is set out by appropriate allegations in a supplemental complaint or answer.

MOTION by the plaintiff, The Industrial and General Trust, Limited, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance, upon the dismissal of the complaint by direction of the court at the close of the plaintiff's case, on a trial at the New York Trial Term.

Louis Marshall, for the plaintiff.

Stephen H. Olin, for the defendants.

McLAUGHLIN, J.:

This action was originally brought to recover damages for the alleged conversion of certain bonds of the Birmingham, Sheffield and Tennessee River Railway Company. The plaintiff had a recovery, which was affirmed by the Appellate Division in the second department (52 App. Div. 195), but reversed by the Court of Appeals and a new trial ordered. (170 N. Y. 233.) Intermediate the reversal of the judgment and the new trial, the plaintiff, by permission of the court, served an amended complaint, by which the action was changed from one to recover for conversion to one to recover for the breach of a contract. The issues raised by an answer to the amended complaint came on for trial, where, at the close of plaintiff's case, the complaint was dismissed, and the exception taken thereto, as well as those taken during the trial, ordered to be heard in the first instance at the Appellate Division.

There is little or no dispute as to the material facts involved. On the 1st of April, 1889, the Birmingham, Sheffield and Tennessee River Railway Company, a corporation organized under the laws of the State of Alabama, executed a mortgage to the Knickerbocker Trust Company of New York upon all its property, including its franchises, to secure the payment of an issue of bonds and coupons thereto attached, of which there was then or thereafter issued 2,975 bonds of the par value of \$1,000 each. In June, 1893, the railway company having previously defaulted in the payment of the interest on the bonds, the trust company instituted a suit in the United States Circuit Court for the northern division of the northern district of Alabama for the foreclosure of the mortgage and the sale of the property covered thereby. In this suit a receiver was appointed *pendente lite* of all the corporate property of the railway company. At the time the suit was commenced and the receiver appointed, the plaintiff, an English corporation, held 570 of the bonds above referred to which it had previously placed in the hands of its counsel in New York, Mr. Untermyer, who then and thereafter represented and looked after its interest with reference thereto. The receiver endeavored to effect a reorganization of the railway company, but his efforts in this direction were unavailing, and on the 9th of April, 1895, a reorganization agreement was executed by which J. Kennedy Tod, Edmund A. Hopkins and James

G. Leiper were appointed a committee to represent the bondholders. In pursuance of this agreement the plaintiff, through Mr. Untermyer, deposited its bonds with the Manhattan Trust Company and received in lieu thereof a certificate, negotiable in form, which stated that the bonds were held by the Manhattan Trust Company in accordance with the terms and conditions of the reorganization agreement. This agreement, when the case was before the Court of Appeals (170 N. Y. 234), was summarized by it as follows: "This reorganization agreement recited the insolvency of the railway company, the pendency of the foreclosure proceedings, the appointment of a receiver and the necessity for the bondholders to reorganize for the protection of their mutual interests. It provided, in its first article, that the bonds should be deposited with the Manhattan Trust Company, 'subject to the order and full control of the committee, to be used for any purposes under this agreement.' The second article constituted the defendants a reorganization committee and in succeeding articles were set forth the powers of the committee. The fourth article provided, so far as material, that 'the committee is hereby expressly authorized and empowered, and it shall be its special duty to prepare and adopt a plan for the reorganization of the affairs of the railway company, with or without foreclosure. When the committee shall have adopted such plan, a copy thereof shall be lodged with the Manhattan Trust Company. Notice shall thereupon be given to the holders of the trust certificates issued hereunder, and such plan shall become binding upon all of the said holders who do not withdraw herefrom (in the manner hereinafter provided), unless the holders of a majority in interest of the said certificates shall, within twenty days after such notice, file with the Manhattan Trust Company their written dissent from the plan.' The fifth article provided, so far as material, that 'any holder of a trust certificate issued hereunder may, at any time within thirty days after the mailing to him of notice of the filing of a plan of reorganization, as hereinbefore provided, withdraw from this agreement and recover back the bond or bonds deposited by him upon payment of his *pro rata* share of the expenses theretofore incurred by the committee,'

etc. The sixth article provided that the committee, for the purpose of effecting a reorganization of the affairs of the railroad company, was authorized to take such steps as it might deem advisable for the formation of a new corporation and for transferring to the new corporation all the assets of the railway company, and it was authorized to 'use the deposited bonds for the purpose of paying for any assets or franchises purchased.' The eleventh article provided, so far as material, that 'the committee may supply any defects or omissions which it may deem necessary to be supplied to enable it to carry out the general purpose of this agreement. The committee is authorized to construe this agreement and its construction shall be final.' The twelfth article provided that no member of the committee shall be liable for 'anything but his own willful misconduct.'"

The agreement contained no express provision that the plan of reorganization referred to in the 4th paragraph should be filed by the committee before a sale of the property was had, nor was there any provision in it as to the time when the same was to be prepared and filed. This fact was seemingly of some little concern to Mr. Untermyer, because, as appears from the evidence offered at the trial, he endeavored at various times, both before and subsequent to the sale, to ascertain from the committee when the plan would be prepared and what steps were being taken in that direction. Thus, as early as July 9, 1895, he wrote to the committee or its chairman, saying : "I am this morning in receipt of advices from London asking if any plan of reorganization has as yet been drafted or suggested. May I ask you to advise me whether such a plan is now under consideration and how soon they are likely to be advised of its details? Will you also kindly inform me whether judgment has now been entered in the foreclosure suit, and if so, when it is proposed to sell the property?" To which the chairman of the committee on the sixteenth of July replied : "A decree of sale has been entered. The property is now being advertised for sale and will, I understand, be sold upon the 16th day of September. No plan has yet been adopted and I am unable to predict the probable date upon which a plan will be issued, but I have not forgotten your request to be advised of it in advance." On the 16th of September, 1895, after the sale had been duly advertised both in New York and Alabama, the property covered by the mortgage was sold at public

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anction and the same bid in by the committee — then consisting of the defendants Tod and Leiper — Hopkins, the other member, having in the meantime resigned — for \$500,000, which sum the decree had fixed as the lowest bid to be entertained by the commissioner appointed to conduct the sale. On the twenty-ninth of October following the sale by an order of the court was duly confirmed, and between that date and the 30th of November, 1895, the defendants caused to be incorporated the Northern Alabama Railway Company, to which, by leave of the court it assigned the bid at the foreclosure sale. On the 30th of November, 1895, the sale was completed by the payment of the purchase price, which was partly in cash and partly by use of the bonds held by the committee and the delivery of a deed to the new corporation. Thereafter the commissioner who made the sale attended at the office of the Manhattan Trust Company, which held the bonds as depository for the committee, and indorsed upon each bond the following:

“NEW YORK, 29th November, 1895.

“139 76-100 dollars paid on this bond as part of the proceeds of sale under foreclosure.

“J. FRED JOHNSON,

“*Commissioner.*”

After this indorsement had been made the bonds were left with the trust company where they now are. The Northern Alabama Railway Company issued certain mortgage bonds which, with its entire capital stock, were held by or for the reorganization committee and the same was continued to be so held until July, 1898, when a plan of reorganization was filed and notice thereof given to all of the holders of certificates as provided in the reorganization agreement. As already indicated, the agreement provided that the plan, when thus filed and notice given, was to be binding upon the holders of certificates who did not dissent therefrom and withdraw their bonds as therein provided. The plaintiff, through Mr. Untermyer, received notice of the filing of the plan, but he did not then, nor thereafter, withdraw the bonds deposited by him for the plaintiff and he still holds the certificates representing them. The defendants, as commissioners for the bondholders, hold the property acquired by the Northern Alabama Railway Company subject to

the certificates. During the trial the plaintiff sought to prove the value of the property of the railway company, but on objection of the defendants such evidence was excluded and exceptions taken. The foregoing seem to be all of the facts which are material to the disposition of the questions presented.

I am of the opinion that the complaint was properly dismissed.

First. The breach of the agreement upon which plaintiff based its right to damages was the alleged violation of the committee to file a plan of reorganization prior to the sale of the property in the foreclosure proceeding. The agreement certainly contains no express provision that the plan should be filed before the sale, so if there were a breach, it is because such provision can fairly be implied. Is the agreement subject to such construction? It seems to me not, when considered as a whole, in connection with its purpose and the object which it sought to accomplish. Consider the situation. The railway company was insolvent. It had defaulted in the payment of the interest upon its bonds; a suit had been instituted to foreclose the mortgage; a receiver had been appointed, and a sale of the entire property was about to take place. Confronted with this situation, it was desirable that there should be united action on the part of the bondholders to the end that the property might not be sacrificed on the sale and that their interests should be protected by acquiring the property for a reorganization. Under these circumstances the agreement was made, in which it was provided that the bondholders should deposit the bonds with the Manhattan Trust Company "subject to the order and full control of the Committee" and that such deposit, in and of itself, should transfer "to the Committee the full legal and equitable title thereto for all the purposes of this agreement." The purpose was to acquire the property covered by the mortgage and "effect a reorganization of the affairs of the Company, either through or without foreclosure," for the benefit of all. Nor does the act of the plaintiff's agent indicate that he supposed the committee was obligated under the agreement to file a plan prior to the sale, because he did not object to the sale on this ground, notwithstanding he was notified on the 16th of July, 1895, of the time when the sale would take place and that no plan had then been, and the committee was unable to say when one would be, prepared.

Second. But assuming that there was a breach of the agreement, in that the committee did not file a plan prior to the sale, I am, nevertheless, of the opinion that the complaint was properly dismissed, because the plaintiff failed to prove it had sustained damage by reason thereof. When the case was before the Court of Appeals Judge GRAY, delivering the prevailing opinion, said: "That the plaintiff was not damaged by the failure to file a plan of reorganization prior to the foreclosure sale is evident enough." (170 N. Y. 247.) This seems to have been the view of the Appellate Division, where WOODWARD, J., said: "The railway property was the foundation of the security for the bonds, and it is not clear how the plaintiff could have suffered any loss by the committee purchasing the property and holding it in trust for the bondholders." (52 App. Div. 203.) The fact that a recovery on the first trial was affirmed by the Appellate Division, and that there was a division of the judges of the Court of Appeals on the subject, is of no importance, so far as the question now under consideration is concerned. The action then was to recover damages for conversion, while here it is to recover damages for the breach of a contract, and the distinction between the two is clear. In the action in its present form the plaintiff, to recover, must prove that it has been damaged by defendants' acts, whereas, in an action for conversion, the recovery would be measured by the value of the bonds, and this irrespective of whether or not the plaintiff was actually damaged by the defendants' acts. (*Industrial & General Trust v. Tod*, 170 N. Y. 247.) Was the plaintiff damaged by the defendants' acts, and, if so, how? They purchased all of the property covered by the mortgage at the foreclosure sale, which they procured to be transferred to a new corporation organized for the purpose of receiving the same, and then tendered to the plaintiff its share of the securities of such new corporation, including its stock. There is no allegation in the complaint, nor was any evidence offered at the trial, to show that the securities thus tendered to the plaintiff were worth less than the value of its bonds. The bonds of the old company and the securities of the new were based upon the same property. In the old company plaintiff had a lien, while in the new company it has a title. It is of no importance whatever what was the value of the property, whether \$500,000 or \$3,000,000. The plaintiff's proportionate

share of that property is all it is entitled to receive, and this has been tendered to it. The bonds which it deposited gave it an undivided interest in a mortgage which was a lien on the property. The defendants, acting as agent for it and the other bondholders, with the bonds deposited purchased the property and held for its benefit its proportionate share, as represented by the trust certificate. It still has the same proportionate share of the same property, and the only difference is that its lien, by the acts of the defendants, has ripened into a title. How, under such circumstances, can it be said that any damages have been sustained?

Third. The complaint was properly dismissed, because it appeared at the trial, and the fact was uncontradicted, that on or about July 8, 1898, a plan of reorganization was prepared and filed — notice of which was given to the plaintiff in accordance with the agreement — and, as the plaintiff did not withdraw its bonds, its consent and approval of the plan was, under the terms of said agreement, conclusively given and conferred. The agreement, it will be remembered, provided that the committee was authorized and empowered to prepare and adopt a plan for the reorganization of the affairs of the railway company; that when such plan was adopted a copy should be filed with the Manhattan Trust Company and notice given to the holders of the trust certificates issued thereunder; and that such plan should become binding upon all of the holders who did not withdraw in the manner specified, unless a majority in interest of the holders of said certificates should, within twenty days after such notice, file with the trust company their written dissent from the plan proposed. The manner specified in which a holder of a certificate might withdraw is set out in the 5th paragraph of the agreement, which, so far as material, is as follows: "Any holder of a trust certificate issued hereunder may, at any time within thirty days after the mailing to him of notice of the filing of a plan of reorganization * * * withdraw from this agreement and receive back the bond or bonds deposited by him upon payment of his *pro rata* share of the expenses theretofore incurred by the committee * * *. Upon the withdrawal of the bonds represented by such certificate or certificates * * * as above provided, the holder * * * shall be thereupon, and without any further act, fully released from the obligations of this agreement and from such plan

of reorganization, but as to every certificate holder who does not, within the said period of thirty days, withdraw the bonds represented by his certificate or certificates, his assent and ratification of the said plan shall be conclusively and finally assumed, conferred and given."

But it is urged that the action being at law the rights of the parties must be determined as of the time when the action was commenced. As a general rule this would be true, and for the obvious reason that the issues presented in such actions, as determined by the pleadings, are of that time. There are exceptions to the rule, however, one of which is where a fact has arisen subsequent to the joining of issue, which either increases, diminishes or extinguishes the right to a recovery. Such fact can always be proved in a legal action where the same has been set out by appropriate allegations in a supplemental complaint or answer. (*Howard v. Johnston*, 82 N. Y. 271.) Here, on the 30th of January, 1903, the plaintiff served what is termed an amended complaint, but which might in some respects be termed a supplemental complaint, inasmuch as facts are alleged which occurred subsequent to the commencement of the action. But however this may be, the defendants served an answer to the amended complaint in which they alleged as a separate defense that, in July, 1898, they prepared and filed with the Manhattan Trust Company a plan of reorganization, and gave notice to all of the holders of the trust certificates, including the plaintiff, in accordance with the reorganization agreement; that none of the holders of the trust certificates filed a written dissent from the said plan with the trust company, nor had any of them, including the plaintiff, withdrawn or sought to withdraw from said reorganization agreement, or paid or tendered or offered to pay any share of the expenses incurred by the committee; and by reason thereof plaintiff had assented to and ratified said plan, and was bound by the action of the defendants. It was upon the issue raised upon this answer to the amended complaint that the parties went to trial, where the facts set out in this defense were conclusively established. It is true the plaintiff's agent insisted, at and prior to the time that the plan was filed, that the committee had no right to use the plaintiff's bonds in

the purchase of the property, and on the 20th of July, 1898, Mr. Untermyer wrote the committee, in which he said: "My client's claim is, as you know, that the committee had no authority to use their bonds in purchasing the property. They will do nothing to affect their rights in the pending litigation." But the facts, nevertheless, are undisputed that a plan of reorganization was filed and notice given to Mr. Untermyer, as agent of the plaintiff; that he did not file any written dissent with the Manhattan Trust Company, or endeavor, in the manner provided in the agreement, to withdraw the bonds which he had deposited; and by express provision of the agreement a failure to withdraw within the time specified ratified the act of the committee as to the plan filed, and finally and conclusively bound the certificate holders with reference thereto.

The view thus expressed renders it unnecessary, specifically, to consider the various exceptions taken by the plaintiff during the trial, because if the conclusion be correct that there was no breach of the agreement and the plaintiff was not damaged by the acts of the defendants, then it could not have been injured by the rulings to which exceptions were taken.

It follows that the motion should be denied and exceptions overruled, and judgment directed in favor of the defendants dismissing the complaint, with costs.

VAN BRUNT, P. J., and INGRAHAM, J., concurred; O'BRIEN and HATCH, JJ., concurred on the ground that there was no proof of damage.

Motion denied and exceptions overruled, and complaint dismissed, with costs.

EDWARD A. PRICE and PETERA B. WORRALL, Respondents, v. DAVID LEVY and DAVID LACHMAN, Appellants.

Order of arrest—when the moving papers fail to show personal knowledge by the affiant of the fact that alleged false representations were made by the defendant to a commercial agency.

In an action to recover damages for alleged false representations, by which the plaintiffs were induced to sell goods to the defendants, an application for an order of arrest was made upon the complaint and an affidavit made by one of

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the plaintiffs, which alleged that the defendants, for the purpose of inducing the plaintiffs and other merchants throughout the city of New York to sell and deliver to them goods, wares and merchandise upon credit, made a false statement to the commercial agency of R. G. Dun & Co.

The affidavit averred that the false statement read as follows:

"April 10, 1903, at this address, David Levy (one of the defendants) gave our reporter above personal details and dictated the following statement: Financial condition on December 30, 1902, as per inventory (here followed a statement of financial condition). (Signed) D. LEVY & CO.

"April 15, 1903."

The affidavit then continued: "That deponent's firm of Fred Butterfield & Co. are subscribers to said mercantile agency and obtained said statement from said agency prior to the sale and delivery to the defendants of the goods hereinafter mentioned."

The plaintiffs did not present the affidavit of any member of the firm of R. G. Dun & Co. or of the reporter to whom the statement was alleged to have been made.

Held, that the moving papers were insufficient to justify the granting of the order of arrest;

That there was nothing to show that the affiant had any personal knowledge that the defendants made or signed the statement attributed to them, or that he ever saw the original statement made to the reporter;

That, on the contrary, it appeared that his knowledge was derived solely from the statement furnished by R. G. Dun & Co., and that the only fair inference to be drawn from all the facts was that the latter statement was not the original statement but a copy thereof;

That it could not be inferred that the statement referred to in the affidavit was in writing and was seen by the affiant, and that the latter knew the signature of the defendants to be correct;

That even if such an inference could be drawn from the papers, it would not be sufficient to justify the granting of the order, as such an order must be based upon facts set out in the affidavit, and from which, if uncontradicted, the court can see that the party proceeded against is guilty of the charge made against him.

APPEAL by the defendants, David Levy and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 26th day of February, 1904, denying the defendants' motion to set aside an order of arrest theretofore granted in the action.

Stillman F. Kneeland, for the appellants.

Emanuel J. Myers, for the respondents.

McLAUGHLIN, J.:

This action was brought to recover damages upon a sale of goods, wares and merchandise, which sale was alleged to have been induced by false and fraudulent statements of the defendants as to their financial responsibility.

Upon the verified complaint and affidavits an order of arrest was granted, which the defendants, upon the same papers, moved to have vacated. Their motion was denied, and they have appealed.

The papers upon which the order was granted, so far as such alleged false and fraudulent statement is concerned, were to the effect that the defendants, for the purpose of inducing the plaintiffs and other merchants throughout the city of New York to sell and deliver to them goods, wares and merchandise upon credit, made a false statement to the commercial agency of R. G. Dun & Co. The statement thus referred to purports to be set out in the affidavit of one of the plaintiffs and after giving the firm name and business of the defendants, together with their individual names and residences, is as follows:

"April 10, 1903, at this address, David Levy gave our reporter above personal details and dictated the following statement: Financial condition on December 30, 1902, as per inventory:

"Assets."

" Mdse.	\$7,024.84
" Notes and Accts. Rec.	17,680.71
" Cash on hand and in bank.	1,728.16
" Fixtures.....	116.50
	<hr/>
	\$26,550.21

"Liabilities."

" Open account for merchandise.	7,140.43
	<hr/>
	\$19,409.78

" Insurance.....	\$7,500.
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"(Signed) D. LEVY & CO.

" April 15, 1903."

The affidavit then continues as follows: "That deponent's firm of Fred Butterfield & Co. are subscribers to said mercantile agency

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and obtained said statement from said agency prior to the sale and delivery to the defendants of the goods hereinafter mentioned."

Manifestly, this proof was insufficient to establish that the defendants made and signed the statement upon which the plaintiffs allege they relied. No facts are stated from which the court can see, or even infer, that the maker of the affidavit had any personal knowledge on the subject; on the contrary, the only fair inference to be drawn from the facts stated in the affidavit is that the affiant's knowledge is confined to information derived from R. G. Dun & Co., and in this connection it is to be observed that there is no affidavit by any member of the firm of R. G. Dun & Co., or by its reporter to whom the statement is alleged to have been made, nor even is the name of this reporter given. This brings the case therefore, directly within the principle laid down in *Hoormann v. Climax Cycle Co.* (9 App. Div. 579), where this court held that the averments of facts as upon personal knowledge in an affidavit made to procure an attachment is not sufficient, unless circumstances are stated from which the inference can fairly be drawn that the affiant has personal knowledge of the facts which he alleges. This case was followed in *Einstein v. Climax Cycle Co.* (13 App. Div. 624), and followed, or the same principle reasserted, in *Tucker v. Goodsell Co.* (14 id. 89); *Lehmaier v. Buchner* (Id. 263); *Shuler v. Birdsall Manufacturing Co.* (17 id. 228); *Wallace v. Baring* (21 id. 477); *Martin v. Aluminum Plate Co.* (44 id. 412); *James v. Signell* (60 id. 75).

Here, as already indicated, there is nothing to show that the affiant had any personal knowledge that the defendants made or signed the statement attributed to them, or that he ever saw the original statement; on the contrary, it appears that his knowledge is derived solely from the statement furnished by R. G. Dun & Co., and the only fair inference to be indulged in from all the facts stated is that this statement was not the original, but a copy. The original was made on the 10th of April, 1903, as appears from the following recital in the one furnished: "April 10, 1903, at this address, David Levy gave our reporter above personal details and dictated the following statement." The one furnished was not dated April 10, but April 15, 1903.

The learned justice at Special Term was of the opinion that from

the facts stated in the affidavit of one of the plaintiffs it could fairly be inferred that the statement referred to was in writing and was seen by the affiant, and that he knew the signature of the defendants to be correct. No such inference can fairly be drawn from the papers, and if it could, it would be insufficient. A mere inference will not justify the granting of an order of arrest. Such order must be based upon facts set out in the affidavit, and from which, if uncontradicted, the court can see that the party proceeded against is guilty of the charge made against him.

The order appealed from, therefore, must be reversed, with ten dollars costs and disbursements, and defendants' motion to vacate granted, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and HATCH, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

FRIEDA VON SCHUCKMANN, Respondent, v. WALTER R. HEINRICH, as Administrator, etc., of HERMAN O. HEINRICH, Deceased, Appellant.

Assignment under seal of a life insurance policy — presumption of a valid consideration in addition to "natural love and affection" recited as the consideration therein — administrator of the assured not chargeable with costs — allowance of a premium paid by him.

In an action brought by Frieda Von Schuckmann against the administrator of Herman O. Heinrich to determine which of the parties was entitled to the proceeds of a policy of insurance upon the life of the said Herman O. Heinrich, it appeared that the policy was issued April 7, 1900, and was made payable to Heinrich's executors or administrators; that on August 14, 1900, Heinrich executed and delivered to the plaintiff an instrument sealed and acknowledged by him assigning the proceeds of said policy to her; that the assignment contained the following recital: "in consideration of natural love and affection, I hereby assign and transfer unto Frieda Von Schuckmann * * * my intended wife."

Prior to the issuing of the policy Heinrich had been paying his addresses to the plaintiff and she had promised to marry him if she could bring herself to think that she could bestow upon Heinrich the love and affection she thought should accompany a promise to marry.

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After the assignment was made she notified Heinrich that she had decided not to marry him. Heinrich accepted the determination as final, but evidently continued to regard her with affection. He made no demand upon her for the return of the assignment of the policy of insurance, and it did not appear that he ever expected or desired a return of the same.

Held, that as the assignment of the policy of insurance was under seal, and was acknowledged, a presumption arose that it was based upon a valid consideration;

That the burden was upon the defendant to overthrow this presumption by proof, and that as he did not produce such proof or show that the plaintiff did not give an adequate consideration for the assignment quite independent of love and affection, or of mutual respect, the latter was entitled to receive the proceeds of the policy;

That as it did not appear that the defendant was guilty of any fault in laying claim to the proceeds of the policy of insurance, the court should not have awarded costs against him personally;

That the administrator should also be allowed a premium which fell due before, and was paid by him after, the death of the assured.

APPEAL by the defendant, Walter R. Heinrich, as administrator, etc., of Herman O. Heinrich, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of December, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, awarding to the plaintiff the amount of a certain life insurance policy.

David B. Simpson, for the appellant.

James A. Speer, for the respondent.

HATCH, J.:

On the 7th day of April, 1900, the John Hancock Mutual Life Insurance Company, of Boston, Mass., issued a policy of life insurance upon the life of Herman O. Heinrich in the sum of \$2,500, payable to his executors or administrators, upon satisfactory proof of his death. On the 14th day of August, 1900, the said Heinrich executed and delivered to the plaintiff an instrument in writing under his hand and seal, assigning the proceeds of said policy upon his death to her. Said assignment was executed in duplicate upon blank forms furnished by the insurance company and under the rules of the company, one copy being filed in its office and the other given to the plaintiff as aforesaid. After the death of Heinrich

the plaintiff made demand upon the insurance company for payment of the policy to her, and payment being refused, she commenced an action against the company to recover the amount secured to be paid by the policy. The defendant also made claim to the proceeds of the policy to the company, and the latter admitting liability to pay, made a motion to obtain an order of interpleader, which motion was granted, and the defendant was brought into the action as a party, and the insurance company, pursuant to the order of interpleader, paid into court to the credit of the action the sum secured to be paid by the policy. The answer of the defendant averred, *inter alia*, that the assignment held by the plaintiff was procured by fraud and misrepresentation practiced upon the deceased, which avoided the same, and that it was also void for lack of consideration. The recital in the assignment was "in consideration of natural love and affection, I hereby assign and transfer unto Frieda von Schuckmann, * * * my intended wife." The proof upon the trial tended to establish that for some time prior to the time when Heinrich procured the policy to be issued upon his life he was paying his addresses to the plaintiff and had made a proposal of marriage to her, which was not accepted. He continued, however, to call upon the plaintiff and the parties made a conditional engagement, which depended upon the state of plaintiff's affection for Heinrich, which in substance was that if she could bring herself to think that she could bestow upon the deceased the love and affection which she thought should go with a promise to marry, she would accept his proposal. It appears that she never was able to bring the state of her affections to that point, and so notified the deceased of her inability to accept the proposal, accompanied by the statement that she loved another and could not marry him. This notification was contained in a letter written to the deceased after the assignment had been made. He accepted the determination as final, acquiesced therein and evidently continued to regard her with affection and to respect her for what she had done for him in forming his character. He made no demand upon her for a return of the assignment, and the record contains no suggestion of any expectation or desire upon his part that the same would or should be returned to him. It is not claimed that there was anything illegal in the deceased insuring his life for the benefit of the plaintiff, or but that he had legal right to make a

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gift of the policy to the plaintiff and invest her with title thereto and right to enforce the same upon his death. The court in its finding negatived the claim of fraud upon the part of the plaintiff in procuring the assignment, and found that the delivery of the assignment to the plaintiff constituted a gift of the policy to her and awarded judgment in her favor. The evidence sustained the finding that there was no fraud in the transaction. The deceased fully understood what he did, and he had an abundance of opportunity after the plaintiff had made her final decision not to marry him to have procured a return of the assignment to him, if he had the legal right to have it returned, or otherwise to disavow his act. He did neither, but, with full knowledge of all the facts, permitted the transaction to stand as originally consummated. It is not necessary to determine whether the proof disclosed all of the elements constituting a good gift *inter vivos*. The assignment vested in the plaintiff the legal title to the policy, and resort may be had to any evidence in support of the validity of the assignment disclosed by the testimony. The assignment itself was under seal and was acknowledged. Presumptively, therefore, a valid consideration was established, and the onus was upon the defendant to overthrow this presumption by proof. (*Home Insurance Co. v. Watson*, 59 N. Y. 390; *Torry v. Black*, 58 id. 185; Code Civ. Proc. § 840.) No proof whatever was offered to overcome this presumption, and for aught that appears in this record the plaintiff gave an adequate consideration which was quite independent of love and affection or of mutual respect. We think, therefore, that the plaintiff showed herself entitled to receive the proceeds of the policy.

We are of opinion, however, that the judgment should be modified by allowing to the defendant the sum of forty dollars, premium which he paid upon the policy after the death of the deceased. This premium was due prior to his decease and was required to be paid. It constituted, therefore, a proper allowance to be made to the defendant from the recovery. We also think that the costs and the extra allowance should not have been awarded against the administrator personally. It does not appear that he was guilty of any fault in resisting the claim of the plaintiff, or in laying claim to the fund. While sections 1835 and 1836 of the Code of Civil Procedure are not technically applicable to this case, because the judg-

ment, except for costs, does not proceed against the administrator, these sections show the policy of the law with respect to the liability of the personal representatives for costs, and as this is an equity action, the award of costs was within the discretion of the court, and in view of all the circumstances, we think that no costs should have been awarded against this defendant.

The judgment should, therefore, be modified in these respects, and as modified affirmed, without costs of this appeal to either party.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment modified as directed in opinion, and as modified affirmed, without costs.

BROOKE MACKALL and JENNIE W. MACKALL, Respondents, *v.* JACOB VAN VECHTEN OLcott and LAURA I. OLcott, Appellants.

Agreement by a second mortgagee to bid in the mortgaged property for the benefit of the mortgagor at a foreclosure sale under the first mortgage — it does not impose an obligation to complete the sale by paying the amount of the bid and to hold the title for the mortgagor's benefit — its effect on a second sale — effect of letters written between the parties — no confidential relation creating a trust ex maleficio.

In an action brought by Brooke Mackall and Jennie W. Mackall, his wife, against Jacob Van Vechten Olcott and Laura I. Olcott, his wife, to establish a trust in certain real property and to compel the defendants to account to the plaintiffs, it appeared that in 1898 the property in question was owned by Mr. Mackall and was subject to a first mortgage for \$65,000 held by one Harrison, and to a second mortgage for \$5,000, which Mrs. Olcott had taken at the instance of Mrs. Mackall, who was an intimate friend; that an action to foreclose the first mortgage was brought, and that Mr. Olcott agreed to bid in the property at the sale, and thus afford the Mackalls an opportunity prior to the time fixed for the completion of the sale of procuring a new loan and of thus protecting their equity in the property.

Olcott did bid in the property and gave the Mackalls notice to that effect and offered to assign his bid to them if they could raise the necessary amount of money. Neither Mackall nor Olcott was able to raise the money in time to make compliance with the terms of sale, and a resale of the property was had upon which Olcott again bid in the property. After the resale Olcott wrote Mrs. Mackall the following letter: "You probably know by this time that I have again bid the property in for \$72,500, and have put up a deposit of \$2,500 in cash. The title must be passed on the 30th of December. When I

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bid the last time I received a number of offers to purchase the property, so that the entire indebtedness on the first and second trust deeds would be paid and leave some slight balance over; although my counsel in Washington advises me that the title under these sales in a purchaser is absolutely good, you can appreciate that there is no disposition on my part to desire to make any money on any purchases. Will you not write to me forthwith as to the exact amount of money that you would sell the property for, in case it is under your control entirely? In other words, please give the lowest cash figure. I did my utmost pending the time between the last sale and the actual closing of the title, to make arrangements to borrow sufficient to (complete) my purchase, but was unable to do so. I certainly do not wish to make another default, but with equal certainty I do not desire to do anything that you will not approve of."

The Mackalls failed to raise the amount necessary to complete the resale. Olcott raised the necessary money and took title to the property. It was not claimed that Olcott had been guilty of any fraud.

Held, that Olcott's obligation to the Mackalls with respect to the first sale was simply to bid in the property and thus afford the Mackalls an opportunity of raising the necessary moneys prior to the time fixed for the completion of the same, and that upon the failure of the Mackalls to raise such moneys it was competent for Olcott to do so and to take title to the property for his own benefit;

That the obligation, if any, which Olcott assumed towards the Mackalls in respect to the resale of the property, was not any greater than the obligation assumed by him in respect to the first sale thereof, and that, consequently, Olcott acquired by his purchase of the property on the resale the same title as any other purchaser;

That the evidence did not establish any express or implied agreement on the part of Olcott to bid in the property upon the resale and hold the same for Mackall's benefit;

That letters written by Olcott, after he had sold the property, in which he expressed a willingness to create a trust in favor of Mrs. Mackall for the amount of the profits realized upon such sale, did not furnish any evidence establishing an agreement that Olcott was to bid in the property for the protection and benefit of Mackall;

That such an agreement could not be established by letters written by the Mackalls after the transaction;

That no confidential relation existed between the Olcotts and the Mackalls which could be treated as creating a trust *ex malicio* in favor of the latter.

APPEAL by the defendants, Jacob Van Vechten Olcott and another, from a final judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 18th day of December, 1903, upon the report of a referee theretofore appointed pursuant to an interlocutory judgment

in favor of the plaintiffs entered in said clerk's office on the 5th day of May, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, with notice of an intention to bring up for review upon such appeal the said interlocutory judgment.

J. Hampden Dougherty, for the appellants.

Herbert C. Smyth, for the respondents.

HATCH, J.:

This action was brought to establish a trust and to compel the defendants to account to the plaintiffs. It was shown upon the trial that the plaintiff Brooke Mackall was the owner of certain real property in the city of Washington, D. C. In 1895 he and his wife, Jennie W. Mackall, executed a deed of trust, or mortgage, upon the property to secure the payment of \$65,000, with interest thereon at the rate of five and one-half per cent per annum. Brooke Mackall became ill and for a considerable period was unable to pay the interest due upon the mortgage. The holder, a Mr. Harrison, threatened foreclosure, when Mrs. Mackall wrote to Mrs. Laura I. Olcott, the wife of the defendant Olcott herein, who was an intimate friend of Mrs. Mackall, and obtained from her a loan of \$5,000, to secure which the plaintiffs gave a second mortgage upon the premises on the 7th day of February, 1898.

The evidence is probably sufficient to establish an agreement between Olcott and the Mackalls that he would bid off the property for Mackall's benefit to enable him to procure a new loan thereon. This is expressed in the letter written by Olcott, under date of October 25, 1898, to Mackall, as follows: "I was not able to attend the sale in Washington; but on my behalf, the property was bid in by Mr. Birney, and I made the deposit of \$500. Mr. Birney writes me that it takes \$70,900 to cover Mr. Harrison, and that the bid that he made on my behalf was \$71,000. Of course you appreciate that the only reason why I made this bid was to protect you, and you certainly now have an opportunity to have the additional time that you wished to procure the loan. I, myself, have not any particular belief that it will be so easy as you think, but if you can procure the loan so that Mrs. Olcott will not be under the necessity of raising the amount of cash that is necessary, of course she will be only

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too glad to assign the bid to you. In fact, had it not been for your letters to her, I think she would have preferred to let her own \$5,000 go. Hoping that you will be able to procure this loan, and hoping also that your ideas of the value of this property are not entirely exaggerated, I remain, Yours very truly, J. Van Vechten Olcott."

At this point in the negotiations between these parties it is clear that the only protection which Olcott had agreed to furnish to the Mackalls was to bid in the property at the sale, thereby enabling Mackall to procure a new loan and thus protect whatever equity he had in the property. Had the transaction stopped here and Olcott had done nothing more, it is clear that no liability of any kind could attach to him. He had then fulfilled the obligation which he had assumed. He had a further right. He had made a deposit of \$500 upon the sale. Mrs. Olcott's mortgage of \$5,000 was unpaid. He, therefore, in the event of a failure of Mackall to furnish the money, in order that compliance might be made with the terms of the sale, had the right to assume that obligation himself for the purpose of protecting his own interest and the interests of his wife. In such event he would have been under no obligation to have held the property for Mackall's benefit or to account for anything which he might realize upon a subsequent sale, either public or private. Nor could he have been charged in such transaction with a violation of the obligation which he had assumed or of offending in any sense either against law or morals. Mackall did not raise the money either by loan or otherwise to protect his interest in the property, although he made efforts so to do, and certainly Olcott was under no obligation to act further for him; but he, like Mackall, was unable to make compliance with the terms of the sale, as he had not made preparation for raising the money, nor was he required to pay the amount of his bid as between himself and Mackall. It was Mackall's default in failing to raise the money within the period between the date of the sale and the date when his right to redeem expired. Olcott not being able to complete his sale, a resale of the property was subsequently had, at which the property was again struck off to Olcott for \$72,500. Between the first and second sales, while it appears that Olcott made endeavors to raise the money to comply with the terms of his first bid and that such endeavor

upon his part was communicated to Mackall, yet there is nothing to show that during such negotiations he assumed any other or further obligation to protect Mackall's interest. On the contrary, it clearly appeared that he was then forced into a position where he was required to protect his own and his wife's interest, not through any fault of his, but through the failure of Mackall to comply with the terms of the sale. The only evidence upon this subject is found in a letter written by Mrs. Olcott to Mrs. Mackall, in which she stated "never think I will go back on you," and expressing the hope that Mr. Olcott could so arrange matters that a new sale would not be necessary and the belief that he could speedily sell the same for a considerable amount over all incumbrances upon the property, and that he was doing all in his power for Mrs. Mackall. Mrs. Mackall testified that just before the second sale of the property Mrs. Olcott came to see her and stated to her that the reason Mr. Olcott did not come with her was that he was remaining in the city to do what he could to protect the Mackalls. Mrs. Mackall also testified that by reason of this letter and these interviews they forebore any attempt to procure bidders to represent them upon the resale. But beyond the assurance that Olcott was trying to prevent a resale of the property by complying with the terms of his bid and the other matters to which we have called attention, there is nothing upon which could be founded any obligation upon Olcott's part to further protect Mackall's interest, while it is clear that he had the legal right to protect his own and in so doing he violated no duty which he owed to Mackall. Nor do we find anything between these periods which would justify the finding of an agreement upon his part to further continue to protect the Mackalls in any form. After the resale Olcott wrote Mrs. Mackall the following letter, under date of December 16, 1898: "You probably know by this time that I have again bid the property in for \$72,500, and have put up a deposit of \$2,500 in cash. The title must be passed on the 30th of December. When I bid the last time I received a number of offers to purchase the property, so that the entire indebtedness on the first and second trust deeds would be paid and leave some slight balance over; although my counsel in Washington advises me that the title under these sales in a purchaser is absolutely good, you can appreciate that there is no dis-

position on my part to desire to make any money on any purchases. Will you not write to me forthwith as to the exact amount of money that you would sell the property for, in case it is under your control entirely? In other words, please give the lowest cash figure. I did my utmost pending the time between the last sale and the actual closing of the title, to make arrangements to borrow sufficient to (complete) my purchase, but was unable to do so. I certainly do not wish to make another default, but with equal certainty I do not desire to do anything that you will not approve of." The rights of these parties are to be determined by the status of the case as made at this point. After the failure of the Mackalls to raise the money necessary to redeem after the first sale, it is clear that Olcott was as free to raise the money and take the property for his own benefit or permit it to go to a resale and bid it in in like manner, without incurring any more obligation than would any other purchaser. Mackall had notice of every step which was taken and had all the opportunity to redeem the property after the first sale, or to make any other disposition of it that he was able to, and Olcott became as free to act after his failure to comply with the terms of his engagement as though he had never had negotiations with him. The letter which he wrote after the second sale contains no element of any agreement, nor is there recognition of his having made any. On the contrary, he expressly declares it to be his purchase, and that he did not desire to make another default and he notifies Mrs. Mackall that he has no desire to make any money by the transaction and desired to know what her views were with respect to the lowest cash sum which she would be willing to take if the property was entirely under her control, but as for recognition of any right or interest of Mackall in and to the property there is not the slightest, nor is there any such recognition of any such right or interest between the date of the notification of the first bid and during the period that Olcott held title to the property. The theory upon which the learned court below decided the case, as expressed in its findings, is that it was the understanding of the parties that the defendants would purchase the property at the foreclosure sale for the benefit of the plaintiffs and account to them for any surplus that might remain upon a sale of the property beyond the moneys advanced and disbursements necessarily or properly made or incurred,

and that out of such understanding and the confidential relations between the parties a trust was created in favor of the latter which imposed an obligation upon the Olcotts to account for the proceeds of the property. We are unable to find support for this finding in the evidence. The letters written by the defendant Olcott after he had made sale of the property in which he expressed a willingness to create a trust in favor of Mrs. Mackall of the amount which he had received from a sale of the property over and above the sums necessary to pay his wife's mortgage and reimburse him for expenditures furnishes no evidence upon which to found an agreement that the property was bid in for the protection and benefit of Mackall. It was a voluntary recognition upon his part of what he had written after the second sale that he did not desire to make a profit out of the transaction, but it did not create, or tend to create, any primary obligation upon his part to do otherwise than he did. The letters written by the Mackalls after the transaction cannot serve to establish an agreement upon Olcott's part to bid in the property and hold the same for Mackall's protection. They were mere declarations upon their part, made after the transaction, and cannot serve as evidence in support of any agreement, no matter how positively expressed or how often reiterated. All of the correspondence which occurred, before or after title had vested in Olcott, between these parties does not establish an agreement to bid in and hold the property for the benefit of Mackall. The legal rights can only flow from the status which existed at the time when the transaction took place. That the Mackalls acted upon the assumption that Olcott would protect them and that all he did was for their benefit does not suffice to create an obligation where such obligation did not exist at the time when Olcott bid in this property on the resale. It is impossible to find in all of the correspondence an express or implied agreement upon Olcott's part to bid in this property and hold the same for the benefit of Mackall. The only obligation which is shown to have been assumed by Olcott was to bid in the property at the first sale in order to give opportunity to Mackall to redeem the property therefrom, and that obligation was discharged. If it be assumed that there was a continuing obligation upon Olcott's part to further protect Mackall's interest upon the second sale, his obligation at that time was not greater than it was at

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the first sale. When he bid in the property at the second sale, he immediately notified Mackall of the fact and when the right to redeem expired. Mackall, therefore, had notice of all the facts, and he then became obligated to raise the money and comply with the terms of the sale in like manner as he was upon the first sale. He did nothing, and thus Olcott was forced, for his own protection, to take title to the property. So that in either event, whether it be held that Olcott's obligation ended with the first sale or continued to the second, it was the same obligation and Olcott fully met it. It was Mackall's failure to raise the money at each time which produced the subsequent results, but as to that there never was any obligation upon Olcott's part to protect Mackall to that extent. It is not claimed, nor has the court found, that in anything which Olcott did he perpetrated a fraud. Neither in the complaint, proof or the findings of the court is it claimed or suggested that Mr. Olcott perpetrated a fraud or was guilty of fraudulent conduct in any of the transactions which led up to, or which existed, at the time when title to the property became vested in him. The complaint proceeds upon the theory of an express agreement to take title to the property and hold the equity of redemption therein in trust for the plaintiffs.

As already suggested, the court was unable to find any express agreement; consequently the judgment cannot be sustained upon the theory of the complaint. In order to reach the conclusion which it did, the court was forced to find an implied understanding, but this implied understanding, as we have already seen, did not embrace any undertaking upon the part of Olcott to bid in the property, raise the money to pay the amount of the bid and then hold it for Mackall's benefit. The only agreement which Olcott undertook to carry out, and which he discharged, was to bid in the property upon the sale. It is clear, therefore, that so far as the judgment is based upon any agreement, either express or implied, it cannot be sustained. The facts warranted no such finding, and no trust was created under such circumstances. (*Wheeler v. Reynolds*, 66 N. Y. 227.) To meet this condition the court went a step further and found that the defendants occupied towards the plaintiffs a confidential relation, and under the authorities they became trustees of

the plaintiffs, and upon a combination of these findings the judgment is sought to be supported. To sustain this view there must have been fraud, either actual or constructive, or there must have been an unconscionable breach of duty. Of actual fraud there was none; nor are we able to see that there was constructive fraud or breach of duty. In *Kellum v. Smith* (33 Penn. St. 158) it was said: "When the purchaser at a sheriff's sale promises to hold for the debtor and afterwards refuses to comply with his engagement, the fraud, if any, is not at the sale, not in the promise, but in its subsequent breach. That is too late. It is abundantly settled that equity will not decree such a purchaser to be a trustee, unless there is something more in the transaction than the mere violation of a parol agreement." This doctrine was approved in *Wheeler v. Reynolds* (*supra*), and such undoubtedly is the law. The case narrows itself, therefore, to the single question whether there was such a confidential relation existing between these parties that it may be laid hold of for the purpose of creating a trust *ex maleficio* for the benefit of the plaintiffs. It was stated by Judge ANDREWS in *Wood v. Rabe* (96 N. Y. 414) "there are two principles upon which a court of equity acts in exercising its remedial jurisdiction. * * * One is that it will not permit the Statute of Frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief." Upon this principle that case was decided, as was also the case of *Ryan v. Dow* (34 N. Y. 307), and upon these cases and others, which do not add to their force, the respondents now rely to support the judgment. The difficulty is that the facts which exist in this case do not fit the principle. The confidential relation existing between these parties had its inception in the friendship between Mrs. Olcott and Mrs. Mackall, and it is evident that the Olcotts were desirous to do anything within reason to assist the Mackalls in their distress, but the confidential relation only prompted Mr. Olcott to undertake to bid in the property and furnish Mackall an opportunity to redeem. There is not a statement, either oral or written, prior to the time when Olcott took title to the property which shows, or tends to

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show, that it was ever contemplated by any of the parties that Olcott should bid in this property at the sale, furnish all of the money to complete the purchase and hold the same in trust for Mackall's benefit. No such obligation arose from any confidential relation existing between these parties and certainly it was not found in any agreement. If the relations are to be laid hold of to charge Olcott as a trustee *ex maleficio* it would compel us to announce that Olcott could not purchase the property, or complete his purchase, in order to protect the interests which he then held, or that of his wife, without imposing upon him in so doing the obligation of a trustee for the benefit of Mackall. The defendant certainly could not be deprived of the right of protecting his own property interests save only under penalty of committing a constructive fraud. In protecting those interests we see no reason why he did not have the same standing as did any other purchaser at the second sale. It was no fault of Olcott that Mackall was unable to raise money. He had opportunity so to do and failed and Olcott was in nowise responsible for such failure. Olcott having fulfilled the only obligation which he ever assumed and Mackall having made default in availing himself of the opportunity thus afforded him, we think that there was no confidential relation existing between these parties sufficient to bind Olcott to further efforts in behalf of Mackall, and that he then became free to protect the interests which he and his wife had in the property, bid the same in and complete the purchase without violating either law or morals, and that thereby he became vested with the title free of any claim thereon by Mackall.

This leads us to the conclusion that the judgment should be reversed and a new trial granted, with costs to the appellants to abide the event.

VAN BRUNT, P. J., INGRAHAM and LAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellants to abide event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ISMAR S. ELLISON, Respondent, v. PATRICK LAVIN, Police Officer, Defendant.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant.

Lottery — a distribution of money and cigars to constitute a lottery must depend exclusively upon chance.

The term "lottery," as defined in section 328 of the Penal Code, which provides

"A lottery is a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance whether called a lottery, raffle or gift enterprise, or by some other name," only includes schemes for the distribution of money and other property exclusively or practically exclusively by chance.

A corporation, for the purpose of advertising cigars, in the sale of which it was interested, offered to distribute a sum of money and a quantity of cigars among "The persons who estimate nearest to the number of cigars on which \$3.00 tax per thousand is paid during the month of November, 1903, as shown by the total sales of stamps made by the United States Internal Revenue Department during November."

The competition was restricted to persons sending to the corporation a certain number of bands taken from the cigars which the corporation was advertising, but no discrimination in the price of such cigars was made between purchasers thereof who participated in the guessing contest and those who did not.

For the purpose of those sending estimates the corporation published the statistics showing the number of cigars for which revenue stamps had been issued in each month from January, 1900, to November, 1902.

Held, that the corporation was not engaged in conducting a lottery, as the distribution of the money and cigars did not depend exclusively or practically exclusively upon chance.

VAN BRUNT, P. J., and INGRAHAM, J., dissented.

APPEAL by The People of the State of New York from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of November, 1903, sustaining a writ of habeas corpus theretofore issued on behalf of the relator and discharging the said relator from custody.

The return of the police officer shows that he arrested and held the relator by virtue of a warrant duly issued by a justice of the Court of Special Sessions, commanding the arrest of the relator upon information duly filed that the relator was guilty of the crime of

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advertising a lottery in violation of section 327 of the Penal Code. The relator traversed the return presenting the depositions upon which the warrant was issued. The depositions showed that the relator was the sole editor and proprietor of the *United States Tobacco Journal*, a weekly trade journal published in the city of New York and circulated throughout the United States "among the leaf tobacco trade," and that on the 9th day of May, in the year 1903, he published in the said *United States Tobacco Journal* an advertisement of the Florodora Tag Company of Jersey City, N.J., as follows:

"THE UNITED STATES TOBACCO JOURNAL.

"SAVE CIGAR BANDS.

"Another Free Distribution of

"\$142,500.00

"Will be made in December, 1903,

"Based on the month of November, 1903.

"To SMOKERS OF

Cremo	Nerve
Cubanola	Star
George W. Childs	Lillian Russell
Jackson Square	Turco
Premios	Velvet
Exports	Continental (10c)
La Belle Creole (10c)	Detroit Free Press
Fontella	Siona
Renown	Spaniola
Salva Fuma	Two Orphans (2 for 5c)
Santa Bana	Benefactor
Peola	Florodora (3 for 10c)
Smokettes	Florodora Operas (5 for 10c)
Columbia (10c)	Pioneer
Dowledo	
Wego	

"How many cigars (of all brands, no matter by whom manufactured) will the United States collect taxes on during the month of November, 1903?

"(Cigars bearing \$3.00 tax per thousand.)

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"The persons who estimate nearest to the number of cigars on which \$3.00 tax per thousand is paid during the month of November, 1903, as shown by the total sales of stamps made by the United States Internal Revenue Department during November, 1903, will be rewarded as follows:

To the (1) person estimating the closest.....	\$5,000 in cash.
To the (2) persons whose estimates are next closest (\$2,500 each).....	5,000 "
To the (5) persons whose estimates are next closest (\$1,000.00 each).....	5,000 "
To the (10) persons whose estimates are next closest (\$500.00 each).....	5,000 "
To the (20) persons whose estimates are next closest (\$250.00 each).....	5,000 "
To the (25) persons whose estimates are next closest (\$100.00 each).....	2,500 "
To the (50) persons whose estimates are next closest (\$50.00 each).....	2,500 "
To the (100) persons whose estimates are next closest (\$25.00 each).....	2,500 "
To the (2,000) persons whose estimates are next closest (\$10.00 each).....	20,000 "
To the (3,000) persons whose estimates are next closest (\$5.00 each).....	15,000 "
To the (30,000) persons whose estimates are next closest we will send to each one box of 50 'Cremo' Cigars (value, \$2.50 per box).....	75,000 "
<hr/>	
35,213	
35,213 persons.....	\$142,500

"EVERY 100 BANDS FROM ABOVE-NAMED CIGARS WILL ENTITLE YOU
TO FOUR ESTIMATES.

"(One band from 'Florodora' Cigars or one band from 'Floro-dora Operas' counting as two bands from the other cigars mentioned; and no less than 100 bands will be received at any one time for estimates.)

"Information which may be of value in making estimates: The

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number of cigars now bearing \$3.00 Tax per thousand, for which Stamps were purchased, appears below:

	1900.	1901.	1902.
January.....	422,512,494	448,806,638	496,983,717
February.....	394,440,344	417,196,433	445,495,483
March.....	436,122,097	445,641,761	516,599,027
April.....	427,952,658	481,870,212	516,835,163
May.....	456,509,855	553,187,580	523,035,907
June.....	473,591,527	500,693,908	532,151,477
July.....	457,642,572	501,318,407	571,866,633
August.....	483,551,833	485,441,753	565,974,550
September	474,787,902	501,800,523	575,804,470
October.....	532,205,063	574,551,047	628,881,303
November.....	508,258,250	529,308,500	562,444,393
December	467,092,208	479,312,170	

“ONLY CIGAR BANDS ARE GOOD FOR ESTIMATES. SEND NOTHING BUT CIGAR BANDS UNDER THIS OFFER.

“In case of a tie in estimates, the amount offered will be divided equally among those entitled to it. Distribution of the awards will be made as soon after December 1st, 1903, as the figures are obtainable from the Internal Revenue Department of the United States for November, 1903.

“Write your full name and Post Office address plainly on packages containing bands. The postage or express charges on your package must be fully prepaid, in order for your estimate to participate.

“All estimates under this offer must be received on or before October 31st, 1903, by the

**“FLORODORA TAG COMPANY,
“Jersey City, N. J.**

“Send each estimate on a separate piece of paper with your name and address plainly written on each.

“You do not lose the value of your bands. Receipt will be sent you for your bands, and these receipts will be just as good as the bands themselves in securing Presents illustrated in our catalogue.

“Handsomely illustrated 80-page catalogue (page 7 in. x 10 in.) showing all the Presents exactly as they are, and with beautiful

embossed cover lithographed in 10 colors and gold, will be mailed to any address upon receipt of 10 cents, or ten tags, or 20 cigar bands."

Howard S. Gans, for the appellant.

John W. Ingram, for the respondent.

LAUGHLIN, J.:

The question presented by this appeal is whether the relator, by this publication, advertised or published an account of a lottery. Section 327 of the Penal Code declares that any person who "advertises or publishes an account of a lottery, whether within or without the State, stating how, when or where the same is to be, or has been, drawn, or what are the prizes therein, or any of them, or the price of a ticket, or any share or interest therein, or where or how it may be obtained, is guilty of a misdemeanor." It has been sufficiently shown that the relator is responsible for the advertisement, and if the article or notice published shows that the Florodora Tag Company is conducting a lottery, it is manifest that the publication contains a sufficient account of the lottery to render the relator liable.

The inquiry is thus narrowed to the question as to whether this is a lottery, and its solution depends upon the construction of section 323 of the Penal Code, which defines a lottery as follows: "A lottery is a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance, whether called a lottery, raffle or gift enterprise, or by some other name." It is not disputed that this is a scheme for the distribution of property among persons who shall have paid a valuable consideration for the privilege of participating therein. It is contended, however, by the relator, and this contention was sustained at Special Term, that the distribution is not to be made *by chance* within the intent and meaning of this statutory definition of a lottery. This, therefore, is the question presented for decision, and it is one of great public interest and importance.

It is manifestly impossible for any one to ascertain or know in advance the number of cigars in a given month upon which the government will attach revenue stamps of the denomination of three

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dollars per thousand. The period for presenting estimates closed on the last day of the month preceding that for which they were to be made, and obviously there are many other elements of chance that render it difficult for any one to make any estimate that will approximate accuracy.

It is claimed, however, that those making estimates have, as a basis, the information given as to the number of cigars for which stamps were purchased during each month for the years 1900, 1901 and 1902, and that they may be aided by acquiring knowledge of the condition of the tobacco trade both as to supply and demand, and that those possessing the greatest knowledge will be able to estimate more accurately than those without knowledge on the subject. This is undoubtedly true. It is claimed that it follows from the mere fact that those participating in the scheme may be able, by thus acquiring knowledge to aid their judgment, to estimate with a greater degree of accuracy than others, that this is not a distribution of the property and prize money by chance within the prohibition of the statute. If, as has been held in some jurisdictions, the drawings or distribution must depend exclusively on chance, and the chances of winning or being successful cannot be aided in the least by the exercise of judgment, then unquestionably the scheme which the relator has advertised would not constitute a lottery. No case is cited and we find none directly in point in this State or controlling in principle.

In *Reilly v. Gray* (77 Hun, 402), which was an action to recover moneys bet on a horse race, it was held that poolselling did not constitute a lottery within the meaning of section 323 of the Penal Code, and the ground of the decision was that selling pools on horse races was prohibited by statute prior to the incorporation in the Constitution of 1821 of the provision prohibiting the Legislature from authorizing lotteries and requiring it to enact laws to prevent the same, and that the legislation concerning poolselling has been since classified with the legislation concerning gambling and has been kept separate and distinct from the legislation concerning lotteries. In *People ex rel. Lawrence v. Fallon* (152 N. Y. 12) it was held that prizes offered by an association to the winners of horse races is not a lottery, the court adopting and following the reasoning of the court in *Reilly v. Gray (supra)*, but the court made the

following observations: "That statute defines a lottery as a scheme for the distribution of property by chance among persons who pay or agree to pay a valuable consideration for the chance. It is obvious from the language of this statute and the circumstances existing at the time of its passage that it was not intended to include within its provisions every transaction which involved any degree of chance or uncertainty, but its plain purpose was to prohibit and punish certain well-known offenses which had existed and been regarded as crimes before the enactment of that law. The offenses thus sought to be suppressed have long been known and understood, and are clearly distinguishable from the racing of animals for stakes or prizes. There is certainly a great difference between a contest as to the speed of animals for prizes or premiums contributed by others and a mere lottery, where the controlling and practically the only element is that of mere chance alone. A race or other contest is by no means a lottery simply because its result is uncertain, or because it may be affected by things unforeseen and accidental."

In *People v. Gillson* (109 N. Y. 389) it was held that a statute (Penal Code, § 335a) making it a misdemeanor to induce the purchase of one commodity by giving a purchaser of a specified quantity thereof other property was unconstitutional; but there each purchaser of the same quantity was given the same privilege and there was no element of chance involved. In *Hull v. Ruggles* (56 N. Y. 424) it was held that selling candy in packages, some but not all of which contained tickets calling for silverware as prizes, was a lottery; but this depended entirely upon chance. In *Wilkinson v. Gill* (74 N. Y. 63) it was held that "policy" is a lottery. In *Horner v. United States* (147 U. S. 449) it was held that a sale of bonds by the government of Austria, redeemable at a given time, but a certain number of which to be selected by lot were to be redeemable at figures far in excess of their par value as an inducement to purchasers, was a lottery within section 3894 of the United States Revised Statutes (as amd.) regulating the use of the mails, but the selection of the bonds that were to be redeemed for more than their face value was a matter solely of chance. In *Dion v. St. John Baptiste Society* (82 Maine, 319) it was held that a scheme by which a charitable association offered a prize to the person in some profession, office or occupation in whose name the most

money was contributed thereafter was not a lottery ; but while this to some extent depended upon chance yet it depended principally upon the popularity of the individual and the activity and interest displayed by him and his friends. In *Regina v. Dodds* (4 Ont. Rep. 390), where a statute prohibited the distribution of property by lots, cards, tickets or any mode of chance whatever, it was held that a scheme by which the purchasers of merchandise were permitted to guess at the number of beans in a jar, the one guessing nearest to receive the prize, was a scheme for the disposition "solely by the exercise of skill and judgment," for the reason that the participants could figure and estimate with some degree of accuracy on the result. In *Regina v. Jamieson* (7 Ont. Rep. 149) it was held that offering a Shetland pony and cart to a person giving the most accurate estimate as to the number of buttons of different sizes in a half-filled jar, those purchasing merchandise of the person offering the prize only being permitted to guess, was not a disposition of the property depending on chance. In *Dunham v. St. Croix Soap Mfg. Co.* (34 New Bruns. 243), where the public, without making purchases or paying for the opportunity, were permitted to estimate the weight of a large cake of soap for a prize, it was held that the result depended mainly on skill, experience, judgment and calculation and not exclusively on chance, and, therefore, it was not a lottery. In *Hall v. Cox* (1 Q. B. [1899] 198) it was held that a prize offered for accurate prediction of the number of births and deaths in London during a specified week was not a lottery, and that "to constitute a lottery it must be a matter depending entirely upon chance." In *Barclay v. Pearson* (2 Ch. Div. [1893] 154), where an incomplete sentence was given, the final word being omitted, and persons upon paying a shilling were permitted to guess the omitted word, which had been determined in advance and was not necessarily the most appropriate word, it was held that this was a lottery, but that it would not have been had the most appropriate word been called for. In *Caminada v. Hulton* (60 L. J. M. C. [1891] 116, 121) it was held that giving prizes on coupons taken from a sporting paper for picking the winners at future horse races was not obtaining "money by chance or by anything analogous to chance." In *United States v. Rosenblum* (121 Fed. Rep. 180) it was held by THOMAS, D. J., sitting in the United States Circuit Court, for the Southern District of New York, that

prizes to a person guessing the nearest to the number of cigarettes on which internal revenue tax would be paid during a given month was not a lottery within the prohibition of section 3894 of the United States Revised Statutes (as amd.) which is quite as broad as the provision of section 327 of the Penal Code now under consideration. In *Hudelson v. State* (94 Ind. 426) the purchasers of goods whose purchases amounted to fifty cents were permitted to estimate the number of beans in a glass globe for a prize to be given to the person making the nearest estimate. It was held that this was a lottery for the reason that while a calculation might aid in making an estimate, it would only be approximate at most and for all practical purposes the prize would be determined by chance. In *State v. Nebraska Home Co.* (92 N. W. Rep. 763) it was held that a scheme to produce a common fund to be distributed among sharers to help pay for a home or the erection of buildings, which provided that the applications should be numbered in the order received and that the shares should mature in the order of the numbers of the applications, was a lottery.

These are the only adjudicated cases to which our attention has been drawn, or which we have found, that have any direct bearing upon the question. While, therefore, there appears to be no decision in this jurisdiction in point on the question at bar, the weight of authority elsewhere seems to be in favor of confining the lottery statutes to cases where the disposition of money or other property rests exclusively upon chance. A retrospect of the constitutional and statutory provisions of this State leads to the conviction that such also should be the interpretation of section 323 of the Penal Code. Prior to 1813 both public and private lotteries were authorized and regulated by special statutes in our State. By chapter 198 of the Laws of 1813 lotteries then authorized or thereafter to be authorized were regulated. (See 1 R. L. 270.) Chapter 10 of the Revised Laws of 1813 also contained a provision prohibiting private lotteries except as authorized by statute. (2 R. L. 187.) By chapter 206 of the Laws of 1819 private lotteries were, except as authorized by the Legislature, prohibited and public lotteries were regulated and restricted. Section 11 of article 7 of the Constitution of 1821 provided as follows: "No lottery shall hereafter be authorized in this State; and the Legislature shall pass laws to prevent the sale of all lottery tickets within this State, except in lotteries already provided

for by law." Section 26 of article 4 of title 8 of chapter 20 of part 1 of the Revised Statutes as originally enacted (1 R. S. 665), under the heading "Of Raffling and Lotteries," provided as follows: "Every lottery, game, or device of chance, in the nature of a lottery, by whatever name it may be called, other than such as have been authorised by law, shall be deemed unlawful, and a common and public nuisance." Section 27 of article 4 of title 8 of chapter 20 of part 1 of the Revised Statutes (1 R. S. 665) provided that "no person, unauthorised by special laws for that purpose, shall, within this State, open, set on foot, carry on, promote, or draw, publicly or privately, any lottery, game or device of chance of any nature or kind whatsoever, or by whatever name it may be called, for the purpose of exposing, setting to sale, or disposing of any houses, lands, tenements, or real estate, or any money, goods, or things in action," and declared any violation of that section to be a misdemeanor. Section 10 of article 1 of the Constitution of 1846 forbade the sale of lottery tickets or the authorization of a lottery within the State. The provisions of the Revised Statutes continued in force down to the enactment of the Penal Code in 1881. (See Laws of 1881, chap. 676, § 323 *et seq.*) Section 9 of article 1 of the Constitution of 1894 provides as follows: "Nor shall any lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling hereafter be authorized or allowed within this State; and the Legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section."

Prior to the Constitution of 1821 there were special statutory provisions prohibiting horse racing for stakes and betting on horse races and prohibiting "excessive and deceitful gaming" (Laws of 1802, chap. 44; Laws of 1801, chap. 46; see 1 R. L. 222, 152). However, after lotteries were prohibited the Legislature from time to time extended the laws prohibiting betting on horse races and gambling (Laws of 1851, chap. 504; Laws of 1877, chap. 178; Penal Code, tit. 10, chap. 9). In many of the forms of gaming and gambling prohibited by these statutory provisions the disposition of the property depended upon chance and a valuable consideration was paid by the person entitled to participate therein; but the chance was or was supposed to be influenced more or less by the exercise of skill and judgment. It thus appears from the history of

legislation that it was not understood by the Legislature or intended, I think, that anything was prohibited by the lottery statute where, although the disposition of the money or property depended upon chance, such distribution could be influenced by the exercise of skill or judgment. Bearing in mind that for a long period both public and private lotteries were authorized in this State and that when prohibited the Legislature employed language not materially different from that contained in section 323 of the Penal Code now under consideration, the true construction of this statutory provision is, I think, that it was intended to prohibit what were then known as lotteries pure and simple, that is to say, schemes for the distribution of money or other property exclusively or practically exclusively by chance. The Florodora Tag Company which inserted this advertisement is not conducting a lottery. It is apparent that it is engaged in the tobacco and cigar business. The advertisement has evidently been resorted to as a means of advertising the cigars in the sale of which the company is interested. It is evident that the price of its cigars is the same to those who preserve the wrappers and participate in the guessing contest as to those who do not. It furnishes its patrons sufficient information to afford them some basis for making an estimate upon which their right to the prizes will depend and they may possess or acquire other information that will be of assistance.

It may be well for the Legislature to prohibit such forms of competition by declaring enterprises of this character to be unlawful, but it is evident that these methods resorted to in recent years by merchants and traders engaged in ruinous competition were not foreseen in the early days when lotteries were prohibited and, therefore, their prohibition is not within the purview of the lottery statute. A penal statute should be so drafted that an honest business man may know whether or not he is offending against it. If the court should attempt to give a construction to the lottery statute by which dispositions of property depending not wholly upon chance would be included within its prohibition there would be difficulty in the practical application of the law. If we should say that it is immaterial that skill or judgment may influence the determination if the disposition of the property still is mainly controlled by chance, how could a business man determine that question with safety. He

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might be of opinion that the disposition of the property depended mainly upon the exercise of skill or judgment and be innocent of any wrongdoing; but a jury might determine that its disposition depended mainly upon chance which would make him a criminal before the law. These considerations lead to the conclusion that the relator has not advertised a lottery and that he was properly discharged.

It follows, therefore, that the order should be affirmed.

PATTERSON and HATON, JJ., concurred; VAN BRUNT, P. J., and INGRAHAM, J., dissented.

Order affirmed.

PENN COLLIERIES COMPANY, Respondent, v. EDWARD J. MCKEEVER,
Appellant.

Corporation — when it is not doing business in the State of New York.

A foreign corporation engaged in the business of selling coal and of shipping it to buyers had its office in the city of Philadelphia, but maintained what was called a branch office in the city of New York for the convenience of its agent in that city. This agent had no authority to make contracts for the sale of coal, but reported everything to Philadelphia. With the exception of a single cargo none of the coal offered for sale by this agent was within the State of New York at the time of the sale, and almost all of the sales made by him were to parties outside of the State of New York. The corporation had no books of account in the State of New York, nor did it have a bank account in that State or keep coal or other merchandise therein.

Held, that the corporation was not doing business in the State of New York within the meaning of section 15 of the General Corporation Law (Laws of 1892, chap. 687), as amended by chapter 588 of the Laws of 1901, prohibiting foreign corporations from doing business in the State of New York without procuring a certificate of authority from the Secretary of State.

LAUGHLIN, J., dissented.

APPEAL by the defendant, Edward J. McKeever, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 31st day of December, 1903, upon the decision of the court rendered after a trial before the court without a jury at the New York Trial Term.

Frank B. York, for the appellant.

Francis S. McGrath, for the respondent.

PATTERSON, J.:

The plaintiff, a foreign corporation, recovered a judgment against the defendant in an action for goods sold and delivered. The only defense interposed was that at the time mentioned in the complaint the plaintiff was doing business in the city of New York, where the contract of sale referred to in the complaint was made, and that at that time and prior thereto it had not procured from the Secretary of State of New York a certificate that it had complied "with all the requirements of law to authorize it to do business in this State," and that by reason of the failure to obtain such certificate this action could not be maintained. Upon the trial, which was before the court without a jury, it was held, under the proofs, that the plaintiff was not doing business in the State within the meaning of section 15 of the General Corporation Law (Laws of 1892, chap. 687), as amended by chapter 538 of the Laws of 1901.

I think the court below was right in so holding. The plaintiffs' office is in Philadelphia. It had an agent in New York city, and there was maintained there what is called a branch office, but it was for the agent's convenience. It does not appear that the plaintiff was conducting business at that office, and the agent says he did not have exclusive control of the business of the plaintiff in this city. The merchandise sold to the defendant was a cargo of coal, and the business of the plaintiff was the selling of coal and shipping it to buyers. The agent in New York did not make contracts for the sale of coal. He reported everything to Philadelphia. No books of account of the plaintiff were kept in the State of New York; the plaintiff had no bank account in the State and did not keep coal or other goods therein. Apart from the coal sold to defendant, no merchandise offered for sale through the New York agent was situated in the State at the time it was sold; and in every instance, except six, out of 350 sales made through the agent, the sales were to parties outside the State of New York. This particular cargo of coal which the defendant received and now refuses to pay for was, at the time of the sale, within the State of New York, but it had been sold in Philadelphia to a party to whom it was to be delivered here, but who had rejected it.

The case resembles in its facts that of *Cummer Lumber Co. v. Associated Mfrs.' Ins. Co.* (67 App. Div. 151). There, the evidence

established the fact that the plaintiff employed an agent within this State to solicit orders and that agent had an office within the city of New York and orders were sent from New York to the Cummer Lumber Company in Florida where they were accepted and the bills and goods were sent direct from the home office of the plaintiff corporation to the customers. It was held in that case that by maintaining the agency here, the company was not doing business in this State within the meaning of section 15 of the General Corporation Law.

I am of the opinion that the judgment should be affirmed, with costs.

VAN BRUNT, P. J., INGRAHAM and McLAUGHLIN, JJ., concurred; LAUGHLIN, J., dissented.

LAUGHLIN, J. (dissenting):

It appears that the plaintiff is a foreign corporation engaged in mining and selling coal; that it has an annual lease of an office in the city of New York in its own name, has telephone service in connection with the office in its own name, maintains its name upon the door of the office and upon the hall directory of the office building together with the name of Frank H. Olcott as manager; that office stationery is permitted to be used by Olcott showing that the company maintains that office and that he is its manager; that the sale of the coal upon which this action is based was made by Olcott as manager in the city of New York. These facts, in my opinion, show that the plaintiff was doing business in this State. It is conceded that it has not obtained a certificate from the Secretary of State authorizing it to do business here. The contract having been made in this State, the plaintiff is, I think, precluded by section 15 of the General Corporation Law (Laws of 1892, chap. 687, as amd. by Laws of 1901 chap. 538) from maintaining an action thereon. Giving to the evidence on behalf of the plaintiff the most favorable construction, it merely shows that in fact Olcott was a sales agent on commissions without authority to close contracts, except as specially authorized; that he merely took orders subject to the approval of the company at its home office without the State and that except in this instance where the coal happened to be here,

having been rejected by the original consignee, the coal is shipped from without the State after the contract therefor is made, not in New York, but at the home office. If these facts would take the case from without the operation of the statute the purpose of the Legislature in enacting the law would be thwarted. The plaintiff had the benefit of conducting its business, so far as the public is concerned, precisely as if Olcott was in fact its salaried manager and authorized to close contracts.

For these reasons I think the judgment should be reversed and complaint dismissed.

Judgment affirmed, with costs.

MAX BORSUK, Appellant, v. JACOB BLAUNER, Respondent.

Pleading—an answer required to state definitely whether a contract set up in the complaint is admitted or denied—time to move for such relief where the answer is served by mail.

The complaint in an action, brought by the vendee mentioned in a contract for the sale of real estate, to recover from the vendor damages resulting from the alleged inability of the vendor to convey a marketable title, set out the alleged contract in full as an exhibit forming part of the complaint.

The defendant in his answer admitted that he entered into a contract which he believed to be the contract referred to in the complaint, and asked leave to have produced upon the trial the original contract, to which he referred for the terms and provisions thereof, and except as so admitted he denied the allegations of the complaint with respect to the contract.

Held, that the answer was indefinite as to whether the defendant admitted or denied the contract as pleaded in the complaint, and that the plaintiff was entitled to have the answer made definite and certain in this respect.

Where a pleading is served by mail, the time prescribed by rule 22 of the General Rules of Practice for the making of a motion to make it more definite and certain is doubled pursuant to section 798 of the Code of Civil Procedure.

APPEAL by the plaintiff, Max Borsuk, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 15th day of December, 1903, denying the plaintiff's motion to compel the defendant to make his answer more definite and certain and to strike out certain portions thereof.

George J. Gruenberg, for the appellant.

Max D. Steuer, for the respondent.

PATTERSON, J.:

This action was brought upon an agreement in writing for the sale by the defendant and the purchase by the plaintiff of real estate in New York city. The agreement purports to have been made on the 29th of June, 1903. The plaintiff alleges that he paid \$1,000 of the purchase money the day the contract was signed. Performance was to be made on the 3d of August, 1903, at which time the plaintiff avers he offered to perform by tendering the balance of the purchase money and demanding a deed. He asserts that the defendant refused to comply, the allegation of the complaint being that the defendant was not able to convey a good and marketable title to the premises. The plaintiff spent some money in examining the title and he brought this suit to recover back the \$1,000 and the money paid for examining the title, and asked that the amount of his outlay be made a lien upon the land and that the premises be sold to pay it. The alleged contract is set out in full as an exhibit, forming part of the complaint and of the 1st paragraph of that pleading which refers to the making of the contract.

The defendant, answering, admitted that he entered into a contract, which he believes to be the contract referred to in the complaint, and asks leave to have produced upon the trial the original of the contract to which he refers for the terms and provisions thereof, and, except as so admitted, he denies the allegations of the complaint with respect to the contract.

The defendant admits that he received the \$1,000, but sets up that he was at all times ready and willing to perform all the conditions of the contract and convey the property, and, for a separate defense, that he tendered a good title, and that the only objection the plaintiff made was that the premises were subject to easements, and that the plaintiff did not claim that he did not contract to take the property subject to these easements. The answer also sets up that if the premises were subject to easements, the plaintiff had full knowledge of them and consented to take the property subject to them.

Upon this answer the plaintiff moved to make it definite and cer-

tain in several respects, particularly, *first*, to require the defendant to state which of the allegations of the 1st paragraph of the complaint are denied or admitted; *second*, to state whether the allegation of the complaint that the plaintiff and the defendant entered into the agreement set forth in the complaint is admitted or denied by the defendant. The answer is not sufficiently definite and it cannot be determined from it whether the defendant admits or denies the contract as pleaded. There is no denial conforming to the requirements of section 500 of the Code.

The order appealed from is correct, except as to the failure to require the defendant to plead by admission or denial to the contract set forth in the complaint, as being that entered into between the parties. The answer is quite indefinite as to whether the contract is admitted or denied.

There is a point of practice involved in the motion. Under Rule 22 of the General Rules of Practice this motion should have been made within twenty days from the service of the answer. (*Brooks v. Hanchett*, 36 Hun, 71.) It was not so made; but that rule does not apply here, because section 798 of the Code of Civil Procedure provides that where a notice must be given or a paper served within a specified time before an act is to be done; or where the adverse party has a specified time after notice or service within which to do an act, if service of the paper requiring action of the adverse party is made through the post office, the time required or allowed is double the time specified. This answer was served through the post office, and the plaintiff insists that that gave him the right to double time within which to make this motion. His position is well taken and the motion was made in due time.

The order must be modified as above suggested, with costs of this appeal to the appellant.

VAN BRUNT, P. J., INGEBHAM, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Order modified as directed in opinion, with costs of appeal to the appellant.

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INTERNATIONAL MONEY BOX COMPANY, Appellant, v. SOUTHERN TRUST AND DEPOSIT COMPANY, Respondent.

Contract of sale of merchandise "F. O. B. New York City"—a delivery to a carrier, with direction to deliver it to the vendee at Baltimore, Md., and collect charges, is not a compliance therewith—effect of a repudiation of the contract—admission in a defense to which a demurrer has been sustained—it must be considered as a whole.

Where a contract for the sale of merchandise provides that delivery should be made "F. O. B. New York City," the delivery of the merchandise to an express company at New York city, with directions to deliver it to the vendee at its place of business in Baltimore, Md., the cost of carriage to be there collected, is insufficient to pass the title of the merchandise to the vendee, as the vendor cannot bind the vendee by a tender of the merchandise at a place different from that specified in the contract, nor annex to the tender the burden or condition of paying the carrying charges.

The repudiation of the contract by the vendee obviates the necessity for a tender of the goods.

Where a demurrer interposed by the plaintiff to one of the separate defenses set up in the answer has been sustained, the plaintiff cannot avail himself of an alleged admission contained in such defense.

If an allegation in a pleading be offered in evidence as an admission by the pleader, the entire allegation must be taken into consideration.

APPEAL by the plaintiff, the International Money Box Company, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 4th day of November, 1903, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

Clarence D. W. Rogers, for the appellant.

Omar Powell, for the respondent.

O'BRIEN, J.:

The action was for goods sold and delivered under a contract between the parties as follows: "The party of the first part hereby agrees to and does sell unto the party of the second part and the party of the second part hereby agrees to and does buy of the party of the first part 500 savings boxes patented in the United States of

America under Letters Patent No. 664990 for the sum of One dollar (\$1.00) each net cash, F. O. B. New York City. Shipments to be made as follows: 100 to be shipped at once and the balance as ordered by party of the second part. It is understood and agreed that the party of the second part shall order all of the said 500 savings boxes from the party of the first part within one year from date of this agreement. It is understood and agreed that the International Money Box Company is not held responsible for anything further than that which is written in this contract, and this contract or any portion of it is not subject to countermand."

On the trial the evidence offered by the plaintiff consisted of proof of the making of the contract and the introduction of stipulation dated June 29, 1903, between the attorneys, which states:

"I. On or about April 1st, 1902, in part performance of the contract mentioned in the complaint herein and upon which this action is brought plaintiff delivered to defendant 100 boxes of the kind and quality specified in said contract for which the defendant paid to the plaintiff the contract price, to wit, \$100.

"II. On or about February 28th, 1903, without further order or direction from defendant, and in order to carry out and complete performance of said contract on its part, plaintiff delivered to an express company at New York City 400 additional boxes of the kind and quality specified in said contract and the complaint herein, with proper direction to deliver the same to the defendant at its place of business in Baltimore, Maryland (charges of carriage collect).

"III. On March 1st, 1903, said express company tendered the same to defendant at defendant's place of business at Baltimore, Maryland.

"IV. Defendant then and there refused to receive or accept said goods.

"V. Said express company thereupon took said goods away and offered same back to plaintiff, but plaintiff refused to accept them and the express company has ever since retained possession thereof.

"VI. Defendant has made no other payments on account of said contract than the \$100 above specified.

"The parties hereto reserve the right to object to the introduction in evidence of the foregoing stipulation or any part or para-

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graph thereof upon the ground that the facts stated therein are irrelevant, immaterial and incompetent."

With respect to delivery it was incumbent upon the plaintiff to prove either that the defendant had expressly repudiated the contract, which would have made a delivery needless and futile, or that a delivery was made in accordance with the terms of the contract. Upon the latter subject the contract provided that the delivery was to be made F. O. B. New York city, and the proof was that without a request from the defendant the plaintiff delivered to an express company at New York city the 400 boxes with directions to deliver the same to the defendant at its place of business at Baltimore, Md., the charges of carriage to be there collected. Such a tender we do not think was sufficient to pass the title of the boxes to defendant because the plaintiff could not bind the defendant by tender at a place different than that specified in the contract nor could it annex to the tender the burden or condition of paying the carrying charges.

The failure, therefore, to prove a proper legal tender was fatal to plaintiff's right to recover upon this branch of the case.

The plaintiff insists, however, that there was evidence tending to show that the defendant had repudiated the contract, and that, therefore, a tender was unnecessary. Our attention is called to what is said to be an admission in a separate defense embodied in the original answer in which the defendant alleged that the contract was canceled on August 29, 1902, upon which date "the defendant notified the plaintiff not to manufacture or ship any more savings boxes * * * and that the defendant would not accept the said savings boxes, and that the defendant would not keep or perform the contract."

This so-called defense cannot aid the plaintiff and for the reasons, first, that this defense was demurred to by the plaintiff, and the demurrer was sustained, and strictly speaking it should not have been included in this record. And furthermore, if we are to consider it, the record does not show that it was offered by the plaintiff in evidence as an admission, and if it had been it would be necessary to take it as a whole from which the inference would follow that the reason for refusing to accept the boxes or to keep or perform the contract was as alleged by the defendant, that it had been

canceled. Upon the failure to prove as alleged that the plaintiff had sold and delivered to the defendant the boxes, the court properly held that the plaintiff could not recover the amount sued for. The dismissal of the complaint, therefore, was right, and the judgment thereafter entered should accordingly be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

CATHARINE J. BROWN, Individually and as Executrix, etc., of IRA BROWN, Deceased, Respondent, *v.* SARA G. BRONSON and Others, as Executors, etc., of FREDERIC BRONSON, Deceased, Appellants, Impleaded with THE NEW YORK CAB COMPANY, LIMITED.

Collateral pledged to secure a note—entries in the cash book and ledger of the pledgor are incompetent to establish it—Statute of Limitations—when it begins to run in such a case in favor of the pledges—it is not from the date of a demand by the pledgor for the collateral.

In an action in which the plaintiff claimed that a certain note made by a firm, of which her testator was a member, to the order of the defendant's testator, was a renewal note and had been paid, the plaintiff is not entitled, for the purpose of supporting her contention, to introduce in evidence entries taken from the cash book and ledger of the firm, of which her testator was a member, relating to transactions with the defendant's testator.

Sembly, that the rule authorizing the admission in evidence of books of account in favor of the person keeping such books has no application to the case of books or entries relating to cash items or dealings between the parties.

The title to property pledged remains in the pledgor until divested by some sale or by the title being changed in some judicial proceeding, or by the pledgee converting the property to his own use by a sale thereof; in the latter instance the Statute of Limitations begins to run from the time of the actual conversion.

Where the maker of a note, payable in four months after its date, as collateral security for the payment thereof, delivers to the payee a certificate of stock and allows such certificate to remain in the possession of the payee for more than ten years after the payment of the note without making any demand for the return of such certificate, an action subsequently brought by the maker to recover possession of the certificate is barred by the Statute of Limitations.

Such a case does not come within the second exception contained in section 410 of the Code of Civil Procedure, which provides: "Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within

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which the action must be commenced must be computed from the time when the right to make the demand is complete; except in one of the following cases: * * * 2. Where there was a deposit of money, not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand."

APPEAL by the defendants, Sara G. Bronson and others, as executors, etc., of Frederic Bronson, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 9th day of June, 1903, upon the decision of the court rendered after a trial at the New York Special Term.

Flamen B. Candler, for the appellants.

John A. Straley, for the respondent.

O'BRIEN, J.:

The plaintiff, individually and as executrix of Ira Brown, deceased, brought this action to compel the defendants, executors of Frederic Bronson, deceased, to surrender a certain certificate of stock, No. 19, for 100 shares of the common stock of the New York Cab Company, Limited, issued to the firm of Ryerson & Brown and indorsed by them in blank on February 13, 1884.

The stock certificate in question was found by the executors of Bronson in his safe among his securities, and was in an envelope which contained a promissory note dated February 13, 1885, for \$9,750, made by the firm of Ryerson & Brown and payable to the order of Frederic Bronson four months after date. In addition to the certificate and note, there were copies of two receipts and other papers, to which reference will hereafter be made. There was no serious contention but that this certificate, No. 19, for 100 shares of stock, together with two other certificates, came into the possession of Bronson during his lifetime as collateral security for a note of \$9,750, made by the firm of Ryerson & Brown, to whom Bronson had loaned that amount.

The plaintiff had applied to the Supreme Court to compel the cab company to issue a certificate in place of this certificate No. 19, and upon such application the cab company was notified that the

estate of Bronson had found the certificate and claimed an interest therein. Thereupon the plaintiff brought this action against the cab company and the executors of Bronson to determine their interests in certificate No. 19; and the theory sought to be upheld by her proof is, that it was originally given with other securities to Bronson as collateral to a note for \$9,750, made by Ryerson & Brown, which note had been paid, but, for some reason not explained upon this record, remained in his possession until after his death, when its existence and location were ascertained in the manner already stated.

In support of this theory that it was given as collateral security for a note that had been paid, one of the executors of Bronson was examined and testified to having found among the effects of Bronson an envelope containing certain papers, among them the certificate No. 19, two receipts of Bronson, a letter from Ryerson, a memorandum of Ryerson & Brown and receipt, and a note dated February 13, 1885; and that in Bronson's handwriting on the envelope containing these papers was indorsed the following:

"Ryerson & Brown. Collateral for loan of \$9,750 @ 6% int.
Payable 13th June, 1884. Certifs Nos. 19, 76, 77 of 100 shares ea.
New York Cab Co. Ld. Note dated 13 Feby. 1884.

"FREDERIC BRONSON."

The two receipts are as follows:

"76 WALL STREET, NEW YORK CITY.
"13th February, 1884.

"Received from Messrs. Ryerson & Brown one hundred and ninety-nine 88/100 dollars in full payment of interest at 6% on the loan of \$9,750 made to them on the 10th October, 1883, and due on the 10th February, 1884.

"FREDERIC BRONSON press copy
made Feby. 12 / 84."

"Received from Messrs. Ryerson & Brown as collateral for the loan of Nine thousand seven hundred and fifty dollars (\$9,750) made on the 13th February, 1884, three certificates Nos. 19, 76, 77 for 100 shares each of the Common Stock of the New York Cab Company Limited.

"Press copy made Feby 12 / 84.

F B "

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These papers, together with the letter signed by Ryerson to Bronson under date of February 9, 1884, and a memorandum agreement and receipt, justified but one inference, namely, that Bronson in October, 1883, had loaned to Ryerson & Brown \$9,750, and obtained from them the deposit of 300 shares of the stock of the cab company as collateral. That this note was renewed and that it was finally paid are made reasonably certain by the entries in the books of Bronson; and there would, therefore, be no question as to the right of the plaintiff to the return of the certificate were it not for the fact that in the envelope with the other papers was also found a note bearing the date February 13, 1885, which is for the same amount (\$9,750), and for which the defendants claim that the certificate in dispute must have been held as collateral. There was a dispute of fact as to whether or not the date of this note, February 13, 1885, was a mistake, the plaintiff insisting that it should have been February 13, 1884; and it is this difference in the date between the original note, the payment of which was sufficiently proved, and this latter note, with the same amount but of a different date, upon which a controversy arose.

The evidence introduced which plaintiff claims tended to prove that the note was a renewal note and was paid and that there was a mistake in the date was the account in the journal of Frederic Bronson. Instead, however, of relying upon the evidence furnished from the books of Bronson, deceased, the plaintiff, under the ruling of the trial judge, succeeded in introducing in evidence a statement of entries taken from the cash book and ledger of Ryerson & Brown, relating to transactions with Frederic Bronson, which had a direct tendency and considerable weight in support of the plaintiff's contention as to the error in the date of the note found in the envelope, and that the note for which the certificate in dispute had been given as collateral had been paid.

The error committed in allowing these entries in evidence requires a reversal of the judgment. The extent to which books of account and entries from cash books may be allowed in evidence has been frequently discussed, and, without going over the numerous cases, it is only necessary to refer to a late authority (*Smith v. Rentz*, 131 N. Y. 169) where, in the course of the opinion, the court says: "The claim is also made that the books were competent as original

evidence of the entries, under the rule making books of account in certain cases evidence in favor of the party keeping them. We think there is no foundation for this contention. The rule which prevails in this State (adopted, it is said, from the law of Holland) that the books of a tradesman, or other person engaged in business, containing items of account kept in the ordinary course of book accounts, are admissible in favor of the person keeping them against the party against whom the charges are made after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties. This qualification of the rule was recognized in the earliest decisions in this State and has been maintained by the courts with general uniformity."

In addition, we have urged as a ground for reversal the Statute of Limitations, which was pleaded as a defense. The appellants' contention is that either the six-year or the ten-year Statute of Limitations applies, and, as more than ten years have elapsed since the delivery of the certificate to Bronson, if the statute commenced to run from the time of such delivery, or at any time so as to have the ten years expire, then unquestionably the statute would be a bar. The question presented, therefore, is, when did the statute begin to run? There was no demand made for the return of the certificate to the plaintiff until the 27th of December, 1900, and the contention of the plaintiff is that the statute did not begin to run until after such demand was made for the return of the stock.

The evidence would justify the inference that the stock was originally pledged as collateral to the note, and whether we conclude that after the payment of the original loan the certificate was retained by Bronson as a mere custodian or as pledgee for some additional loan, the history of the certificate is such that it may well be deemed that Bronson never held the certificate under claim of ownership or in any other way than as pledgee or custodian. We must regard the rule as now settled that with respect to property pledged, the title remains in the pledgor until divested by some sale or by the title being changed in some judicial proceeding or by the pledgee converting the property to his own use by a sale thereof. (*Markham v. Jaudon*, 41 N. Y. 235.) In the latter instance, the statute will begin to run from the time of the actual conversion.

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The precise question for our determination, however, is as to the rule to be applied in a case where the debtor delivers specific personal property as collateral security for a note which becomes due and is paid more than ten years before any demand is made for the return of the property or before an action is brought for its redemption or reassignment, the creditor in the meantime retaining it in his possession. The question is further complicated by the situation here presented of a note of the debtors of a date different and subsequent to the original note—which original note, it is claimed, was paid—being in the possession of the creditor with the stock certificate and having come into the possession of his executors upon his death. The fact that this note together with the stock was in the possession of the executors of the creditor raised a presumption against the plaintiff which it would be necessary to overcome by proof that such note was merely a renewal of the original note and that it was paid and by some explanation of how it came to be in the possession of the creditor's executors after his death. Apart from this complication, we think that the question which we are called upon to determine must be answered favorably to the contention of the appellants that the statute had run and was a bar to this action. This conclusion is based principally, as it should be, upon the express language of sections 410 and 415 of the Code of Civil Procedure prescribing the mode of computing periods of limitation.

Section 410 of the Code provides: "Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete; except in one of the following cases: * * * 2. Where there was a deposit of money, not to be repaid at a fixed time but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand."

If we should resolve, as did the trial judge, the question of fact favorable to the plaintiff, in holding that the note was paid and that this, being a renewal of the original note, was the only one upon which Ryerson & Brown were indebted to Bronson, it is certain that the right to make the demand for the certificate was then com-

plete; and unless the plaintiff can bring himself within the language of one of the exceptions provided in section 410 of the Code, the statute then commenced to run. The plaintiff insists, however, that the facts here make out a case falling under the exception provided for in the 2d subdivision of the section above quoted. In reading that section it is apparent that what was intended to be protected was the deposit of money such as the ordinary deposit in a bank where no agreement is made for the return of the specific money deposited or for its repayment at a fixed time; or cases where personal property is delivered "not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency."

Here, however, the identical certificate was to be returned on the payment of the note, which was payable four months after its date, and, therefore, upon the facts the plaintiff has failed to make out a case bringing herself within one of the exceptions wherein the time from which the running of the Statute of Limitations is to be computed is to be reckoned from the demand.

The precise question here involved has never, so far as our attention has been called to the decisions, been directly presented; but the argument to be drawn from those where questions very similar were involved we think will support the construction which we have placed upon section 410 of the Code. The earliest of these is *Roberts v. Sykes* (30 Barb. 173), where the pledgor of a note at six months more than ten years after the note became due sought in equity the redemption and reassignment of stock pledged as collateral for the payment, and it was held that the statute was a bar to the plaintiff's right to maintain the action. (See, also, *Jones v. Merchants' Bank of Albany*, 4 Robt. 221.) In *Bailey v. Drew* (2 N. Y. Supp. 212), which was a well-stated case at the Special Term, it is said: "The case of *Roberts v. Sykes* (30 Barb. 173) must be considered as overruled by *Miner v. Beekman* (50 N. Y. 337)." The latter case was where a purchaser, under a void foreclosure sale, was in possession, and the action was begun by the mortgagor for an accounting and leave to pay the amount found due and enter into possession. It was held that the right to remove a cloud on title of real estate was a continuing right against which the ten-year statute would not run. Nothing is said in the opinion

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disapproving of *Roberts v. Sykes*, and, for the reasons stated, we think that the two are clearly distinguishable.

There are other cases referred to by the respondent wherein the court has held that upon their facts they were within the exceptions of section 410 of the Code. Thus, *Roberts v. Berdell* (61 Barb. 37; 52 N. Y. 644), where there was a promise to return the property on demand, and *Bowman v. Hoffman* (22 Civ. Proc. Rep. 371), where the obligation was payable on demand, were such cases; and similarly in *Bailey v. Drew* (*supra*) the note was payable on demand, and while that feature distinguishes it from *Roberts v. Sykes* (*supra*) and analogous cases, they can by reason of such distinction be reconciled. The dictum in the *Bailey* case, however, which would rather indicate that whenever personal property is held under a pledge as security for notes, the right to maintain an action for redemption of such property is not affected by the Statute of Limitations, and such right of redemption continues until a demand is made, and as long as the title of the pledgor remains and has not been divested "either by the sale on notice or by legal proceedings," is, we think, too broad and is not supported by authority.

We do not think that much advantage is to be derived from a further discussion of cases—which we could not, if we would, entirely reconcile—in view of what we regard as the construction to be placed upon the language of section 410 of the Code of Civil Procedure, which is controlling and, with respect to this case, would set the Statute of Limitations running not later than 1887, so that whether we apply the six or the ten-year statute, it had run at the time the demand was made and the action was commenced. It follows that the statute having been pleaded as a defense, it was a bar to the plaintiff's right to the relief sought.

Upon both the grounds stated, therefore, the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, McLAUGHLIN and LAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

A. G. HYDE & SONS, Respondent, *v.* TOBIAS LESSER, Appellant.

Rescission of a sale to a partnership, induced by fraud—an action for damages is maintainable against the partner guilty of the fraud—his discharge in bankruptcy is no defense—proper parties to an action to enforce the contract.

Where goods are sold to a firm in reliance upon fraudulent representations made by a member of the firm as to its financial condition, if the purchaser elects to rescind the sale because of such fraudulent representations, and replevies a portion of the goods, he may maintain an action to recover the damages sustained by him in consequence of the fraud against the partner who made such false representations without joining the other partners.

If he brings the action to enforce the contract of sale, he is obliged to join all of the partners.

The vendor's right of action against the partner who made the fraudulent representations is not affected by a discharge in bankruptcy obtained by such partner subsequent to the sale.

The words "in any fiduciary capacity," used in section 17 of the Federal Bankruptcy Act, which provides "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer, or in any fiduciary capacity," do not qualify the words "fraud" or "embezzlement," or "misappropriation" but simply the word "defalcation." McLAUGHLIN and HATCH, JJ., dissented on other grounds.

APPEAL by the defendant, Tobias Lesser, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 12th day of November, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, sustaining the plaintiff's demurrer to the first and second separate defenses set up in the defendant's answer.

Alexander Blumenstiel, for the appellant.

James J. Allen, for the respondent.

INGRAHAM, J.:

The action is brought to recover the damages sustained by the plaintiff by the sale of certain goods and merchandise, induced by the false and fraudulent representations of the defendant as to the financial condition of a firm of which the defendant was a member. The answer, after denying the allegations of the complaint, sets up

two separate defenses to which the plaintiff demurred. The first defense is that at the time of the purchase of the goods and the creation of the debt set forth in the complaint the defendant, with one Simon Lesser and Israel Lesser, were copartners in business, having the firm name of "Lesser Brothers;" that the goods sold by the plaintiff were sold to the firm of Lesser Brothers as a firm, and that the merchandise so purchased was received by the firm of Lesser Brothers and charged to the said firm by the plaintiff, and that Simon Lesser and Israel Lesser, as copartners, are necessary parties defendants. For a second separate defense the answer sets up a discharge in bankruptcy subsequent to the delivery of the goods to the firm of Lesser Brothers and prior to the commencement of this action. The court below sustained the demurrer to both defenses.

The complaint alleges that the plaintiff's assignor, relying upon statements made by the defendant as to the financial condition of the firm, did "sell and deliver to the said firm of Lesser Brothers, at their request, goods and merchandise, consisting of cotton goods, to the amount and of the value of \$2,335.82." If there was a defect of parties plaintiff, the defect appeared upon the face of the complaint, and the objection should have been taken by demurrer. (Code Civ. Proc. § 488, subd. 6.) It is only where the objection does not appear on the face of the complaint that it can be taken by answer (Code Civ. Proc. § 498), and not having been taken by demurrer it was waived (Code Civ. Proc. § 499). The action, however, is not to enforce the contract of sale. The complaint alleges that upon discovering the fraud the plaintiff's assignor elected to rescind the sale as void, and instituted proceedings to recover the possession of the goods sold, which had been obtained by means of, and relying upon, the fraud, and recovered goods of the value of \$900, but was unable to obtain the remainder of the goods, and that by reason of the premises the plaintiff's assignor wholly lost all of the said goods and merchandise so wrongfully taken from him by the said firm of Lesser Brothers, except the part replevied as aforesaid, to his damage in the sum of \$1,423.90, with interest from the 2d day of October, 1896.

A cause of action based upon these allegations is to recover dam-

ages for the fraud, and not to recover for the goods sold and delivered based upon any contract of the firm of which the defendant was a member. The rescission of the sale and the recovery of the goods, based upon the election to rescind, would prevent an action based upon the contract of sale, as that contract was rescinded by the vendors. Having recovered a portion of the goods, there only remained a cause of action for the damages caused by the fraud, and that cause of action is what is here sought to be enforced. If the action had been to enforce a contract of sale, then all of the partners would be necessary parties, as the contract was joint; but where the cause of action is based solely upon fraud of the defendant, and the recovery sought is the damages caused by such fraud, the action is in tort, and can be maintained against any one responsible for the fraud. It is quite clear, therefore, that the first separate defense is insufficient.

The second defense is based upon a discharge in bankruptcy, and the court below held that this cause of action was not affected by the discharge. Section 17 of the Bankruptcy Law (30 U. S. Stat. at Large, 550), provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer, or in any fiduciary capacity." That the indebtedness here sought to be enforced was one created by the defendant's fraud is clear, and was not discharged, unless the words "in any fiduciary capacity" in subdivision 4 qualify the entire subdivision of the section, so that the debt was discharged unless the debt was created by the defendant's fraud in a fiduciary capacity. Where a fraud has been committed there follows a liability of the guilty party for the damages created by the fraud. The phrase "while acting as an officer, or in any fiduciary capacity," has direct reference to a defalcation, and applies to a defalcation, and not to the former words in the subdivision, "fraud," "misappropriation," or "embezzlement." This construction was affirmed in *Frey v. Torrey* (70 App. Div. 167; affd. on opinion below, 175 N. Y. 501). It was there said that the words "fraud," "embezzlement" and "misappropriation" are not qualified by the clause "while acting as an officer, or in any fiduciary capacity." It is claimed by the learned counsel for the appellant that this case is not

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an authority, as the money there sought to be recovered was obtained by fraud where a fiduciary relation existed; but in that case the plaintiff deposited with the defendant, a private banker, \$150, which he sought to recover, basing his cause of action upon a fraud of the defendant in receiving deposits when he was hopelessly insolvent. No fiduciary relation exists between a bank and his customer, as by the deposit the customer becomes a creditor of the banker for the amount of the deposit. The decision in that case is a controlling authority.

It follows that the judgment appealed from must be affirmed, with costs.

VAN BRUNT, P. J., and O'BRIEN, J., concurred; McLAUGHLIN and HATCH, JJ., dissented.

McLAUGHLIN, J. (dissenting):

I am unable to concur in the opinion of Mr. Justice INGRAHAM. Each of the defenses demurred to is pleaded as a separate and further defense and the first subdivision of each recites that the defendant "reiterates all the allegations hereinbefore contained." The answer preceding the separate defenses contains allegations which deny material portions of the complaint and which are incorporated by the recital in each separate defense. If the recitals were redundant and seriously affected plaintiff's right to demur to the affirmative defenses coupled with them, then they might have been stricken out on motion. (Code Civ. Proc. § 545; *Stieffel v. Tolhurst*, 55 App. Div. 532; *State of South Dakota v. McChesney*, 87 Hun, 293.) But so long as they remain a demurrer cannot be successfully interposed, even though the new matter pleaded does not constitute a defense. This is precisely what this court has decided in at least two recent cases. (*Uggla v. Brokaw*, 77 App. Div. 310; *Holmes v. Northern Pacific R. Co.*, 65 id. 49.) These are still in force, and so far as I am aware have not been questioned. In view of them I think the judgment appealed from should be reversed and the demurrer overruled, with costs to the appellant in this court and the court below.

HATCH, J., concurred.

Judgment affirmed, with costs.

HENRY B. SIRE, Appellant, *v.* SAMUEL S. SHUBERT and Others,
Respondents.

Stay, because of the non-payment of costs—a copy of the order imposing the costs must be first served.

The stay of proceedings prescribed by section 779 of the Code of Civil Procedure, in the event of a failure to pay the costs directed to be paid by an order, does not operate until after a copy of the order has been served upon the party required to pay the costs, whether or not the time for the payment of such costs is specified in the order.

APPEAL by the plaintiff, Henry B. Sire, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 5th day of January, 1904, striking the case from the Special Term calendar.

Josiah Canter, for the appellant.

William Klein, for the respondents.

McLAUGHLIN, J.:

Plaintiff obtained an injunction pending the return of an order to show cause why the same should not be continued during the pendency of the action. On the return of the order the motion to continue was denied and the injunction vacated with thirty dollars costs, and the plaintiff appealed. Intermediate the order vacating the injunction and the hearing of the appeal, the plaintiff served a notice of trial for the December term, 1903, which was returned by the defendant's attorney on the ground that the costs referred to had not been paid. The plaintiff then put the cause upon the Special Term calendar for trial, and the defendants thereupon moved to strike the same therefrom on the ground that it was improperly placed thereon. The motion was granted, and it is from this order that the present appeal is taken.

The fact is uncontradicted that at the time the plaintiff served the notice of trial and placed the cause upon the Special Term calendar the costs referred to had not been paid, and the plaintiff by reason thereof was stayed from proceeding in the action, except to review or

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vacate the order vacating the injunction, if the defendants had taken such proceedings as brought him within the section of the Code relating to the payment of the costs of a motion. The payment of such costs is regulated by section 779, which provides that where the costs of a motion directed by an order to be paid are not paid within the time fixed for that purpose by the order, or if no time is so fixed within ten days after the service of a copy of the order, an execution against the personal property of the party required to pay the same may be issued and all proceedings on the part of the party required to pay the same, except to review or vacate the order, are stayed without further direction of the court until the payment thereof is made. Here it does not appear that any time was specified in the order within which the costs were to be paid, nor does it appear that at the time the plaintiff placed the cause upon the calendar the defendants had served a copy of the order awarding costs. The non-payment of the costs, whether the time of payment was specified in the order or not, did not operate as a stay until after a copy of the order had been served upon plaintiff's attorney. The plaintiff had no notice of the order, and, of course, could not be put in default until such notice was given by the service of a copy of it. If this be the correct construction of this section, then the plaintiff had a right, so far as appears, to serve his notice of trial and place the cause upon the calendar when he did. Having this right, the court erred in granting defendants' motion to strike the cause from the calendar.

It follows that the order appealed from must be reversed, with ten dollars costs and disbursements, and the motion denied, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and LAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs.

JOHN D. SLAYBACK, Respondent, *v.* CHARLES M. RAYMOND and the CARBON STEEL COMPANY, Appellants.

Transfer of corporate stock to be used for a specified purpose — its use for another purpose justifies a rescission of the transaction — a fiduciary relation is created — equitable relief — Statute of Limitations applicable — it runs from the discovery of the fraud — diligence to discover the fraud — equity retains jurisdiction and may grant a money judgment — reversal on questions of fact, when justified.

John D. Slayback, who was a creditor and stockholder of a corporation, delivered his stock in the corporation to the president thereof upon the latter's agreement to transfer such stock to a third party for the purpose of inducing such third party to come to the rescue of the corporation by sustaining its credit.

The president of the corporation did not deliver the stock to such third party, but diverted it to his own use. Notwithstanding such diversion of the stock, the credit of the corporation was maintained.

Held, that a fiduciary relation existed between Slayback and the president of the corporation, entitling Slayback to an accounting for the stock;

That Slayback was also entitled to rescind the transaction and secure a return of the stock so far as such stock remained under the control of the president of the corporation, or of persons who were not *bona fide* holders thereof;

That he was, therefore, entitled to invoke the equitable jurisdiction of the court, and was not limited to his remedy at law;

That an action at law would not afford him an adequate remedy, as he could not obtain therein a return of the stock;

That the six years' Statute of Limitations applied to an action in equity brought by Slayback to secure relief, and that under subdivision 5 of section 382 of the Code of Civil Procedure the Statute of Limitations did not begin to run until Slayback had discovered, or should have discovered, the fraud perpetrated upon him;

That Slayback did not owe to the president of the corporation the duty of exercising active diligence to discover the fraud, or of taking prompt steps to rescind the contract.

The fact that a rescission may not be practicable upon the rendition of a judgment does not oust a court of its equitable jurisdiction; having once acquired jurisdiction, it may retain it and award a money judgment where there would otherwise be a failure of justice.

Before a judgment can be reversed as against the weight of evidence it must appear that the proof offered clearly preponderates in favor of a result contrary to that which has been reached. Mere difference of opinion respecting the conclusion which should have been reached is not sufficient to justify the reversal of a judgment as being against the weight of evidence.

APPEAL by the defendants, Charles M. Raymond and another, from an interlocutory judgment of the Supreme Court in favor of

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the plaintiff, entered in the office of the clerk of the county of New York on the 13th day of July, 1903, upon the decision of the court, rendered after a trial at the New York Special Term, directing an accounting by the appellants before a referee and granting certain other relief.

By the interlocutory judgment the complaint was dismissed as to Annie Louise Raymond, the wife of the defendant Charles M. Raymond, who was one of the original defendants.

Louis Marshall, for the appellants.

Delos McCurdy, for the respondent.

HATCH, J.:

The careful consideration which this case received at the hands of the learned trial judge and the full discussion which was had of the facts and the law, has rendered our labor in disposing of the questions involved comparatively easy. We do not feel called upon to again recite the facts which have been elaborately reviewed by the learned court below (40 Misc. Rep. 601). Indeed, we should not find it necessary to give any expression of our views herein were it not for the earnest insistence of counsel for the appellants that the court adopted erroneous rules of law in making disposition of the controversy. He earnestly contends that the plaintiff has an adequate remedy at law in the recovery of damages for the wrong which he claims to have been done him, in consequence of which the defendants are entitled to a trial by jury of the question of fact which the case presents. We are unable to support this contention. When the stock was delivered by Slayback to Raymond it was upon the distinct understanding and agreement that it was to be delivered to Hemphill, Sr., for the purpose of inducing him to come to the rescue of the Carbon Steel Company by sustaining its credit. Plaintiff was pecuniarily interested in securing the continued credit and solvency of the Carbon Steel Company in order that the securities which he held of the company might remain valuable, and also that it might be able to discharge the indebtedness held by the plaintiff and his wife against it. The stock was delivered to Raymond under such circumstances as brought the latter into a fiduciary relation with the plaintiff. In fact he held the stock in trust for delivery to

Hemphill, having for its object the continued solvency of the Carbon Steel Company and the maintenance of its credit. Raymond had no right or authority to divert this stock from such purpose and when he transferred it to his nephews and nieces and failed to make use of it with Hemphill in securing the credit of the company he was guilty of a breach of trust, violated his fiduciary duty and rendered himself liable to account for the stock, its proceeds and earnings. If we substitute for the delivery of stock by the plaintiff to Raymond the delivery of money for the specific purpose for which Raymond was to use the stock, we have in all essential respects the case which was presented in *Marvin v. Brooks* (94 N. Y. 71). In that case there was a delivery of money to be expended for a specific purpose, and the court in holding that equity acquired jurisdiction of the subject-matter and could compel an accounting of the money thus received, said: "But the jurisdiction of the latter court over trusts and those fiduciary relations which partake of that character remains, and in such cases the right to an accounting seems well established." Here the stock was delivered for a specific purpose, agreed upon between the parties. There would have been no delivery of the stock had the declared purpose of its use not been made obligatory upon Raymond. Having obtained possession of the stock under these circumstances, equity will lay hold of the transaction and require him to account for the manner in which he has performed the duties devolved upon him, and upon him rests the burden of showing that he has discharged the trust reposed in him with fidelity. The doctrine of this case has never been disturbed in this State, and the same rule applies in an accounting for property as for money received under such circumstances. (*Schantz v. Oakman*, 163 N. Y. 148; *Underhill v. Jordan*, 72 App. Div. 71.) In addition to this it appears that plaintiff's remedy at law is inadequate. He was not only authorized to recover any damage which was sustained by reason of the diversion of the stock, but upon discovering the fraud perpetrated upon him he became entitled to a rescission of the entire transaction and the return of the stock, so far as the stock remained under the control of Raymond or so far as the plaintiff was able to follow it into the hands of others than *bona fide* holders. Rescission of a contract may be had where a party has been defrauded in making it and the property remains

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in a form unaffected by accruing *bona fide* rights and where such change has not been worked in the rights of third parties as would render inequitable such rescission so far as it applied to them. This rule has been uniformly applied in the case of agencies through which unfair and fraudulent dealings have been had. (*Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218.)

It is the right of the plaintiff to have restored to him the property which had been misapplied and to receive benefits therefrom so far as the same may be derived from the present situation, and the rights of innocent third parties will not be prejudiced. This entitles him to a return of the stock for the purpose of surrendering it in order that an equivalent of shares may be issued to him by the new corporation. This relief he cannot obtain in an action at law, and to this relief the plaintiff is entitled. (*Pollock v. National Bank*, 7 N. Y. 274; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 id. 365; *Bedford v. American Aluminum Co.*, 51 App. Div. 537.) The same principle is recognized in *Bosley v. N. M. Co.* (123 N. Y. 550), relied upon by the appellant. The fact that a rescission may not be practicable upon the rendition of a judgment does not oust the court of its equitable jurisdiction. Having once acquired jurisdiction, it may retain it and award a money judgment where there would otherwise be a failure of justice. (*Valentine v. Richardt*, 126 N. Y. 272.) It is made to appear in the present case that a large proportion of the stock which was delivered to Raymond still remains under the latter's control, is capable of delivery, and when delivered can be surrendered for shares in the new company. Upon both grounds, therefore, that a fiduciary relation creating a *quasi* trust existed which entitled the plaintiff to an accounting and also upon the right to a rescission of the transaction and a return of the stock, the plaintiff has shown a right to invoke the equitable jurisdiction of this court.

It is a rule of law firmly settled that before a judgment can be reversed as against the weight of evidence it must appear that the proof offered clearly preponderates in favor of a result contrary to that which was reached. Mere differences of opinion respecting the conclusion which ought to be reached is not sufficient to justify the reversal of a judgment as being against the weight of evidence. (*Aldridge v. Aldridge*, 120 N. Y. 614; *Roosa v. Smith*, 17 Hun,

138.) In the present case the proof adduced to show fraud and a breach of duty is in many respects contradictory. We have carefully read the entire record and the argument of counsel upon such subject. The most that can be said in favor of the appellant's position upon this branch of the case is that a finding in favor of the defendant would have had some evidence to justify it and, perhaps, enough to support it; but it is equally clear that the evidence is sufficient in support of the conclusions reached by the learned trial court and, therefore, we would not be justified under well-settled authority in reversing the judgment for this reason. Indeed, after a full and complete examination we are not prepared to say that we should have reached a conclusion adverse to the views of the trial court. On the contrary, we think his conclusion finds ample support in the testimony. The court below in its opinion did not assume to state all of the facts in favor of its conclusion which are found in the record. He was not bound so to do and no useful purpose would now be served by analyzing the entire proof upon this subject. It is enough to announce our conclusion thereon.

It is undisputed that Raymond procured the delivery to himself of these shares of stock; but he acquired thereby no title to the same or right to the possession except for a specific purpose. The purpose for which they were delivered was, therefore, the only matter in dispute. It is established by the findings of the trial court that the stock was diverted by Raymond from the use to which he alone had a legal right to devote it and such finding is supported by the evidence. By such act plaintiff suffered damage in the loss of his stock, and it does not answer to say that notwithstanding the stock was not used for the purpose for which it was delivered, the credit of the company was maintained. Raymond was interested in the maintenance of the credit of the company, and in his position as president he was bound do all things within his power to do to maintain the standing and credit of the company and discharge its obligations, and this he was bound to do quite irrespective of the delivery of the stock to him. It was not delivered to him as a gift, but to be used for a specific purpose, and its diversion from such use charged Raymond with liability without regard to the fact that the credit of the company continued to be maintained. The plaintiff desired to secure the active efforts

of a man of wealth, who was possessed also of sound business judgment and was willing to deliver his stock based upon the consideration that such service would thereby be secured. Concededly, the stock was not used for such purpose, and not being so used it remained the property of the plaintiff, and the fraudulent diversion of it operated to damage the plaintiff to the extent of its value, and this is so even though a use was contemplated which would permanently deprive the plaintiff of it. His interest and ownership, however, could not be severed from the stock unless it was used for the particular purpose for which it was delivered, and to that purpose, concededly, it was never devoted. Raymond procured the delivery of the stock upon the representation that it was to be delivered to Heinphill to induce him to come to the relief of the company. Raymond's own statement shows that he at no time intended to use the stock for any such purpose; consequently, the representation was false to his knowledge. Slayback was deceived thereby and continued to be deceived respecting the disposition which was made of the stock and by such act he suffered damage to the extent of the value of the stock. This, within the authorities relied upon by the appellant, furnishes the essential requisites out of which arises the cause of action. (*Brackett v. Griswold*, 112 N. Y. 454; *Aron v. De Castro*, 36 N. Y. St. Repr. 716; affd., 131 N. Y. 648.)

The fraud which the court has found was perpetrated upon the plaintiff was committed in 1893. The action was not begun until 1900. The six years' Statute of Limitations applied and concededly it would have run had not other matters interposed to prevent it. The case falls within the provisions of subdivision 5 of section 382 of the Code of Civil Procedure which provides that an action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which was cognizable in the Court of Chancery on the 31st day of December, 1846, is barred by the six years' Statute of Limitations but that the cause of action "is not deemed to have accrued until the discovery, by the plaintiff or the person under whom he claims, of the facts constituting the fraud." The court found that the plaintiff first learned of the fraud practiced upon him by Raymond about the month of July or August, 1898, and that in the month of October, 1899, he demanded of Ray-

mond the return to him of the stock. Robinson testified that he had a conversation with Raymond in 1898 or 1899, and after having discovered that the stock had not been delivered to Hemphill he asked the defendant Raymond to return it to the plaintiff, which he declined to do, and that he (Robinson) informed the plaintiff of the fact early in 1898. The plaintiff testified that he first had information upon the subject in 1898 in the spring of that year. This testimony was undisputed. So far, therefore, as direct evidence goes it shows that the Statute of Limitations, within the provisions of the Code to which we have called attention, had not run when the action was begun. Such testimony, however, would not avail to defeat the application of the Statute of Limitations if the plaintiff ought to have discovered the fraud which had been perpetrated upon him within a time when the six years' statute would have run. The rule in such a case, as stated by Judge FINCH in *Higgins v. Crouse* (147 N. Y. 411), is: "Did any facts come to the plaintiff's knowledge which fairly put him on inquiry as to the commission of a fraud, which in the mind of an ordinary man would have awakened suspicion, and which made it the duty of the plaintiff to further investigate?"

The appellant contends that the facts disclosed by this record conclusively established that the plaintiff was possessed of such knowledge and occupied such a relation to the corporation that he was afforded an abundant opportunity to inform himself concerning the status of the corporation and who its stockholders were; that the books were open for his inspection and no obstacle lay in the way of the fullest examination. Many items of evidence are adduced by the appellant in favor of this contention. The learned trial court, however, made a complete and exhaustive examination of nearly all of the items of the testimony now called to our attention, and the conclusion which he reached after such examination, we think, was abundantly justified by the evidence and sufficient to exonerate the plaintiff from any imputation of negligence in failing earlier to discover the fraud. We do not deem it necessary to again analyze in detail and make several answers to this claim of the appellant. While it is true that the learned trial court held that no negligence could be imputed which would defeat the plaintiff in maintaining the action after the discovery of the fraud, short of the running of

the six years' Statute of Limitations, and in his discussion limited the time when the plaintiff might have acquired knowledge to the 5th day of January, 1894, which embraced the period of six years between that date and the commencement of the action, yet the same result flows from the facts as they were developed upon the trial, even though the matter be extended to August, 1898. In applying this rule we are to bear in mind that the plaintiff owed the defendant no duty of active vigilance in discovering the fraud and taking prompt steps to rescind the contract. (*Baker v. Lever*, 67 N. Y. 304; *Delano v. Rice*, 23 App. Div. 327.) The plaintiff had the right to rely upon the representations and to rest in confidence that Raymond would discharge the trust which he had reposed in him, and as the credit of the company continued to be maintained he was lulled into the belief that the measures which he had taken to secure it had been carried out in the manner suggested, and being without suspicion he was not called upon to investigate. What he could have discovered had his suspicions been aroused is not the test. It is what he ought to have discovered after being lulled into security by Raymond and the apparent prosperity of the company which followed it. These matters, instead of arousing suspicion and prompting investigation, operated directly the reverse by encouraging a belief that the things which the plaintiff believed would secure the continued prosperity of the company had been carried out. The court has found that the plaintiff had no knowledge of the fraud perpetrated upon him until 1898. The evidence justified the finding, and it also justified the conclusion of law reached by the court that the plaintiff had standing to maintain the action. These conclusions render it unnecessary to determine whether laches can be invoked as a defense for any act or omission prior to the time when the statute runs. There is much to be said in favor of the rule that it does not, and observations of learned judges trend in that direction. It is not essential to the maintenance of this action that such rule be invoked.

We conclude that upon the facts and the law the plaintiff became entitled to the judgment which has been rendered. It should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON and McLAUGHLIN, JJ., concurred.

INGRAHAM, J. (concurring):

I concur in the affirmance of this judgment, upon the ground that the relation between the plaintiff and the defendant Raymond was in its nature fiduciary, entitling the plaintiff to require Raymond to account for the stock that was placed in his hands to carry out what was understood to be the common object of the parties to rehabilitate the credit of the corporation in which they both were largely interested. The court below has found that Raymond induced the plaintiff to deliver his stock in the corporation in which the parties were interested for the purpose of procuring with that stock the active assistance necessary to enable the company to continue its business. The misrepresentations by which the delivery of that stock was induced are not material to enable the plaintiff to maintain his action to require Raymond to account for the stock that he received and which was to be applied by him for a particular purpose. If Raymond induced the plaintiff to deliver the stock upon the statement that a specified use of the plaintiff's stock was necessary to enable the corporation to continue its business, and the plaintiff delivered that stock upon the representation and understanding that it was to be used to secure the active assistance of the Pittsburg parties in the enterprise, and Raymond, receiving the stock for that special purpose, appropriated it to his own use, without having used it or being required to use it for that purpose, there would, I think, be a cause of action in equity for an accounting, irrespective of the fact that the original delivery of the stock was obtained by fraud. If, after Raymond had received this stock, he had actually delivered it to those in Pittsburg with whom he was in communication, I do not think this action could be maintained in the form in which it was brought; but as the court found, upon evidence which I think sustained the finding, that Raymond represented to the plaintiff that in order to induce those in Pittsburg to become interested in the company it was essential that the plaintiff should transfer his stock to them, and that the plaintiff intrusted Raymond with the stock in question for that purpose, there arose as between the parties a fiduciary relation in regard to that stock whereby Raymond became bound to treat the stock received from the plaintiff as property held by him in trust, to be used for the purpose for which it was delivered and for which the

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plaintiff is entitled to compel Raymond to account. (*Marvin v. Brooks*, 94 N. Y. 71.)

This also answers the claim of the defendants as to the Statute of Limitations, and although I agree with Mr. Justice HATCH that, upon the evidence, a finding that the plaintiff knew or should have known of the fraud which induced him to deliver the stock to Raymond before January, 1894, would have been without evidence to support it, my view of the nature of the action is that it is not controlled by subdivision 5 of section 382 of the Code of Civil Procedure, but that it comes under section 388 of the Code, and the statute would not run until ten years had elapsed from the time the cause of action accrued. I also think that the finding of the referee is amply sustained by the evidence, and that no error was committed to justify a reversal of the judgment.

Judgment affirmed, with costs.

DAVID PERLMAN, Respondent, *v.* MOSES BERNSTEIN, Defendant, Impleaded with JACOB W. HAMMER, Appellant.

Damages on an injunction bond—when a counsel fee is earned in vacating a temporary injunction, not in preventing the granting of an injunction pendente lite.

The complaint, in an action brought by a lessor against an assignee of the lease to set aside the lease, demanded *inter alia* a perpetual injunction restraining the defendant from using the leased premises as a drug store or pharmacy, and also restraining him from prosecuting proceedings to recover possession of the demised premises. The plaintiff obtained a temporary injunction, which was embraced in an order to show cause why the injunction should not be continued *pendente lite*. The defendant appeared upon the return day of the order to show cause, and succeeded in having the injunction set aside.

Held, that the appearance of the defendant upon the return of the order to show cause was not alone for the purpose of preventing the issuance of an injunction *pendente lite*, but for the purpose of procuring the dissolution of the temporary injunction;

That, consequently, the counsel fees paid by the defendant for the services of his counsel on the return day of the order to show cause constituted damages which he had sustained by reason of the injunction order, within the meaning of the undertaking given by the plaintiff on obtaining such injunction.

APPEAL by the defendant, Jacob W. Hammer, from an order of the Supreme Court, made at the New York Special Term and

entered in the office of the clerk of the county of New York on the 18th day of November, 1903, denying the said defendant's motion to confirm the report of a referee appointed to assess the damages sustained by the appellant by reason of the issuance of an injunction herein against the said appellant.

Benjamin Patterson, for the appellant.

Jacob Manheim, for the respondent.

HATCH, J.:

The referee found that the only damages which the defendant Hammer had sustained by reason of the issuing of the injunction were for counsel fees in procuring the injunction to be vacated, which sum he fixed at \$100, and also allowed costs of the reference in determining the amount to which the plaintiff was entitled to be awarded as damages sustained on account of the injunction. It is not claimed that the sums so allowed are in any wise excessive. The ground upon which the learned court at Special Term refused confirmation of the report was, that the damages sustained did not result from the granting of the injunction, but were expended in preventing the issuance of a subsequent order continuing the injunction. Under such circumstances, the cases cited of *Sweet v. Moivory* (71 Hun, 381), *Randall v. Carpenter* (88 N. Y. 293) and others cited by the learned court below, sustain his conclusion. These cases, however, have no application to the one presented by this record. This court, upon an appeal from an order denying the defendant's motion for an order of reference to ascertain the damages sustained by him by reason of the injunction, after the action in which it was issued had been discontinued, reversed the order, holding that the defendant was entitled to an order of reference to ascertain such damages. (*Perlman v. Bernstein*, 83 App. Div. 203.) The adjudication therein necessarily determined that the plaintiff was entitled to damages by reason of the injunction, and this is necessarily so under well-settled authorities as applied to the facts in this case. It appeared herein that the action was brought to set aside a lease made by the plaintiff to Bernstein and by the latter assigned to the defendant Hammer. The action was based upon fraud alleged to have been committed in procuring the lease, coupled with a claimed

subsequent attempt to violate certain covenants contained therein. It also appeared that Hammer was out of possession and had instituted a proceeding in the Municipal Court to remove the plaintiff from the leased premises and to recover their possession. The injunction order was contained in an order to show cause, and restrained the defendant from entering upon the premises or from using the store as a drug store or pharmacy or any similar business, or for any other business than that for the sale of general merchandise ; and also enjoined and restrained the defendant from prosecuting the proceedings in the Municipal Court for the possession of the store and the removal of the plaintiff therefrom. It is evident, therefore, that the injunction order entirely tied the defendant's hands and prevented his enjoyment of the leased premises, and also the prosecution of any steps to obtain their possession.

The complaint demanded, *inter alia*, a perpetual injunction restraining the defendants from using the store as a drug store or pharmacy or from carrying on therein the drug or a similar business, and also that they be restrained from prosecuting the proceedings brought in the Municipal Court. In *Randall v. Carpenter* (*supra*) the injunction was temporary, and there was no prayer for its continuance as a part of the final relief sought in the action ; and as the services which had been rendered consisted of an unsuccessful endeavor to show cause why the injunction should not be continued, it was held that the expenses thus incurred were not damages by reason of the injunction which had been granted. The action in that case was to procure an adjudication respecting the ownership of a certain hotel property, and the injunction *pendente lite* restrained the defendants until the further judgment or order of the court, but it was no part of the permanent relief asked for, or which could be granted under the pleadings, and as the services which were rendered were ineffectual in dissolution of the injunction, and were not necessary to any final determination of the controversy, it was held that they were not such damages as the sureties were required to pay. In *Newton v. Russell* (87 N. Y. 527) it was said : "It is well settled that fees of counsel for services in procuring a dissolution of an injunction and in attending a reference to assess damages consequent thereon are properly within the language of such an undertaking (*Rose v. Post*, 56 N. Y. 603), but it is equally

well settled that counsel fees incurred on the trial of the issue in the action are not allowable upon such assessment, unless they were incurred solely or principally in consequence of the injunction." The exception applies when a trial is rendered necessary to avoid the compelling force of the injunction; but where a trial is had solely to dispose of the issues, and is not essential to get rid of the injunction, expenses incurred in such trial cannot be said to be incurred on account of the injunction.

In the present case the expenses which were allowed were incurred as a direct result of the injunction, within the rule of these cases. The defendant when he appeared in court upon the return of the order to show cause was there, not alone for the purpose of preventing the issuance of a further injunction, but was also there for the purpose of procuring the dissolution of the injunction which had been granted. The order which was entered upon such hearing recites that the defendant was successful in procuring the injunction order, which had been granted, to be vacated and set aside; and such services were clearly incurred on account of the injunction within the cases to which we have called attention, as well as others. (*Ten Eyck v. Sayer*, 76 Hun, 37; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *London & Brazilian Bank v. Walker*, 74 Hun, 395.) In addition to this, had the action not been discontinued or the injunction vacated, the defendant would have been required to prosecute the same to judgment in order to rid himself of the injunction had it been continued. If, therefore, there had been a trial, the expenses incurred in connection with that would have been necessarily rendered in order to permit the defendant to have the advantage of the contract of lease which he had made. It is evident, therefore, that this case is distinguishable from the cases cited by the learned court below and calls for the application of a different rule.

It follows that the order should be reversed, with ten dollars costs and disbursements, and the motion for confirmation should be granted, with ten dollars costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

GEORGE W. A. COLLARD, Respondent, v. FREDERICK C. BEACH, Appellant.

Jurisdiction not assumed by the courts of New York of actions for negligence arising in another State between citizens and residents thereof—failure to take objection on the first trial—effect of such other State accepting jurisdiction of like cases.

The courts of the State of New York will not, in the absence of special facts or circumstances, accept jurisdiction of a cause of action for negligence which arose in the State of Connecticut, where both parties to the action are, and have been since the cause of action arose, citizens and residents of that State.

The fact that the objection to the jurisdiction was not taken upon the first trial of the action, or that the courts of the State of Connecticut will accept jurisdiction of a cause of action for tort arising in the State of New York, where both parties are citizens and residents of the State of New York, is immaterial.

APPEAL by the defendant, Frederick C. Beach, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 22d day of January, 1904, denying the defendant's motion for a dismissal of the complaint upon the ground that the court should decline to entertain jurisdiction of the action, both parties thereto being non-residents.

William H. Lyons, for the appellant.

Robert E. De Forest, for the respondent.

LAUGHLIN, J.:

Upon a former appeal herein we pointed out the impropriety of the Supreme Court entertaining jurisdiction of this action, owing to the fact that the cause of action is for tort, and arose in another State of which both parties were and are residents and citizens. (81 App. Div. 582.) We, however, refrained from a dismissal of the complaint for the reason that the question was not raised at the trial and the circumstances might have changed in the meantime. There is no controversy over the facts and no objection was raised to the disposition of the question by motion at Special Term rather

than deferring it until the trial of the action. The complaint is on a cause of action for negligence, which arose in the State of Connecticut, and it appears that both parties were then, ever since have been and now are citizens and residents of that State. No special fact or circumstance is shown upon which it is claimed that the court should retain jurisdiction, except that the objection was not raised by the defendant or by the court upon the first trial, and that by the pendency and trial of the issues and the former appeal the plaintiff has incurred large expenses. These facts all appeared or might have been presumed when our former opinion was written, and they are clearly insufficient. (*Collard v. Beach*, 81 App. Div. 582; *Johnson v. Dalton*, 1 Cow. 543; *Burdick v. Freeman*, 46 Hun, 138; *Wertheim v. Clergue*, 53 App. Div. 122; *Belden v. Wilkinson*, 44 id. 420.)

The appellant contends that by virtue of the statutory law of Connecticut the courts of that State would entertain jurisdiction of a cause of action for tort arising in New York, where both parties were citizens and residents of New York, and that as a matter of comity, therefore, we should do likewise. No decision by any court of the State of Connecticut is cited in support of respondent's construction of the statutes of Connecticut, and we are not convinced that his construction is correct. But, however that may be, the calendars of the courts of this State are congested, and it being difficult to administer speedy justice to litigants who are obliged to submit their controversies to our courts and have no other forum, it is eminently proper that we should refuse jurisdiction over actions for tort that properly belong in another forum.

There is no force in the contention that it is one of the privileges of a citizen of the United States to bring an action in any State against any person upon whom service can be made therein regardless of their or his residence, or of the nature of the cause of action, or where it arose. The assumption of jurisdiction in most cases would ordinarily be of such infrequent occurrence as not to materially interfere with the transaction of business by the courts, but in the metropolis of the country, toward which and in close proximity other States, having large cities and thickly populated communities, converge, and where there are almost countless people engaged in business who reside in other States, it would impose an undue bur-

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den upon the courts of our State if the practice were established of assuming jurisdiction in such cases.

It follows, therefore, that the order should be reversed, with ten dollars costs and disbursements, and motion granted, without costs.

VAN BRUNT, P. J., PATTERSON and McLAUGHLIN, JJ., concurred; INGRAHAM, J., concurred in result.

Order reversed, with ten dollars costs and disbursements, and motion granted, without costs.

Moses TANENBAUM, Respondent, v. ISAIAH JOSEPHI and Others,
Composing the Firm of ALFRED BENJAMIN & Co., Appellants.

Contract to furnish fire insurance at certain rates — what constitutes a rescission thereof by mutual consent — consideration therefor.

December 24, 1896, a firm of fire insurance brokers made an agreement in writing with a firm of merchants, by which the insurance brokers agreed to procure for the merchants all the fire insurance which the latter should require for a period of three years from February 1, 1897, at the rate of eighty-three cents per hundred dollars in valuation.

At the time the contract was made there was a tariff association composed of seventy per cent or more of the fire insurance companies doing business in the State of New York, which fixed uniform rates of insurance and from time to time changed the same.

The rate specified in the contract was seven cents per hundred less than the rate fixed by the tariff association. The contract provided that if, during the term thereof, the rate should be reduced by the tariff association, the merchants should have the benefit of the reduction; that if the rate should be increased, the brokers should furnish the insurance at the contract rate.

April 28, 1898, the tariff association was dissolved with the result that there was a decided lowering in the rates of insurance.

After the dissolution of the tariff association, the merchants requested the insurance brokers to lower the rate of insurance specified in the contract, stating that one Tynberg had offered them insurance at the rate of twenty cents per hundred. The insurance brokers then informed the merchants that if they could get Tynberg to obtain the execution of an agreement and guaranty prepared by the insurance brokers, the merchants might give Tynberg their insurance.

The merchants then, in the presence of the brokers, wrote a letter to Tynberg to the effect that if he signed the contract and obtained the guaranty inclosed

therein, they would place their insurance with him, but, at the suggestion of the insurance brokers, the part relating to placing insurance with Tynberg was altered to read, "We will then take the matter seriously into consideration."

Tynberg having executed the contract, and obtained the guaranty as suggested, the merchants notified the insurance brokers that they would give their insurance to Tynberg. The brokers then, for the first time, claimed that the contract with Tynberg should be for their account and claimed that the proposition made to Tynberg was simply for the purpose of convincing the merchants that Tynberg's offer was not made in good faith.

Thereafter, during the term of the contract, the merchants placed their insurance with Tynberg. The insurance brokers then brought an action against the merchants to recover damages for the alleged breach of the contract.

Held, that the dissolution of the tariff association did not dissolve the contract; That, notwithstanding that the merchants could procure insurance at a lower rate than that specified in the contract, the insurance brokers could, if they had so elected, have required the merchants to take insurance and pay therefor at the rate specified in the contract;

That the evidence produced by the merchants, if true, established a rescission of the contract by mutual consent;

That the consideration for such rescission was the release of each party from liability under the contract and the fact that the merchants were induced to negotiate with Tynberg.

INGRAHAM, J., dissented.

APPEAL by the defendants, Isaia Josephi and others, composing the firm of Alfred Benjamin & Co., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of March, 1903, upon the verdict of a jury rendered by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 6th day of April, 1903, denying the defendants' motion for a new trial made upon the minutes.

John Frankenheimer, for the appellants.

Ernest Hall, for the respondent.

LAUGHLIN, J.:

The plaintiff's assignors were general fire insurance brokers and he was a member of the firm. The defendants were merchants engaged in business in the city of New York and desired insurance upon their merchandise and fixtures. On the 24th day of Decem-

ber, 1896, plaintiff's assignors and the defendants made an agreement in writing by which the former were to procure all insurance required by the defendants for three years, from the 1st day of February, 1897, at the rate of eighty-three cents per hundred dollars in valuation. The action is brought to recover damages for a breach of this contract. The rate specified in the contract was seven cents per hundred lower than the rate fixed by the Tariff Association. The Tariff Association was an association composed of about seventy per cent or more of the fire insurance companies doing business in the city of New York. The association fixed uniform rates and from time to time changed the same. The contract provided that if during the term of the contract the rate should be reduced by the association the defendants should have the benefit of the reduction, but if the rate should be increased the brokers were obligated to furnish the insurance without any increase in their charges therefor. On the 28th day of April, 1898, the Tariff Association dissolved and thereupon each insurance company in fixing and offering rates acted independently. The result was a decided lowering in the rates. Down to this time the brokers had procured the insurance required by the defendants pursuant to the contract. Early in May, 1898, the defendants informed the plaintiff that insurance was offered to them by other agents at a much lower rate than that specified in the contract. The defendants gave evidence tending to show that the brokers then, instead of standing upon their rights under the contract or asserting that defendants were not entitled to the benefit of the reduction in rates, manifested a willingness to furnish the insurance at fifty cents per hundred; that defendants had been offered insurance as low as twenty cents a hundred and they informed plaintiff that they thought the insurance should be furnished for thirty or forty cents a hundred; that plaintiff representing his firm was unwilling to accede to this suggestion and insisted that no brokers could furnish the insurance as low as twenty cents per hundred; that defendants then divulged the name of one Tynberg as the broker who offered them insurance at that rate; that plaintiff, therefore, informed one of the defendants that if they would get Tynberg to obtain the execution of an agreement and guaranty prepared by the plaintiff, then the defendants might give Tynberg

their insurance; that prior to this time the plaintiff had prepared a contract and guaranty with a view to having defendants submit them to another broker who had tendered insurance at a low rate and he delivered this contract and guaranty to the defendants; that the defendants inclosed the same with a letter to Tynberg; that this letter was dictated in the presence of the plaintiff and as first dictated was to the effect that if Tynberg would sign the contract and obtain the guaranty they would place their insurance with him; that at the plaintiff's suggestion the part relating to placing insurance with him was altered to read, "we will then take the matter seriously into consideration;" that plaintiff also suggested that both parties should sign a waiver of cancellation clause, but that defendants would not agree to this as they never asked or knew of an insurance broker to do this and the plaintiff acquiesced in this view; that Tynberg returned a typewritten copy of the contract to the defendants executed by himself and guaranteed as suggested; that thereupon one of the defendants telephoned the plaintiff informing him of this fact and stating that they would give their insurance to Tynberg; that the plaintiff then for the first time claimed that this was all for his benefit and that the contract should be given for his account and that to this the defendants did not accede and subsequently placed the insurance with Tynberg. After the conversation over the telephone and before the insurance was actually placed with Tynberg, the plaintiff wrote the defendants asserting that the proposition to Tynberg was made merely to convince the defendants that Tynberg's offer was not made in good faith and requesting that no insurance be given to Tynberg or any other firm without consulting him and claiming that if any orders were to be given to Tynberg that they should be for the account of the plaintiff's assignors and submitting new propositions for a reduction of the rate by his assignors to forty and fifty cents respectively. At the close of the evidence the court directed a verdict for plaintiff for the difference between the contract price of eighty-threes cents per hundred and the rate at which the insurance was placed with Tynberg upon all insurance so placed for the balance of the contract period. Defendants excepted to the direction of a verdict and requested to go to the jury upon all questions of fact and also excepted to the denial of this request.

The appellants contend that the dissolution of the Tariff Association dissolved the contract, but this claim is not tenable. They obligated themselves to place all the insurance they required through the plaintiff's assignors and to pay therefor at the rate of eighty-three cents per hundred. The only contingency in which the rate was to be different was the reduction of the rate by "any body of fire insurance companies (similar to a combination at present in existence termed the Tariff Association of New York) or any similar body under any other name." That event has not transpired. Therefore, the defendants were obligated to take the insurance and pay therefor the maximum rate, and plaintiff's assignors could, if they had so elected, have held the defendants to their contract.

The testimony of the plaintiff controverts that offered by the defendants to the effect that if Tynberg would execute the agreement and obtain the guaranty they were at liberty to place their insurance with him. That question of fact should have been submitted to the jury if its determination would have been decisive of the rights of the parties. Assuming the evidence introduced on the part of the defendants to be true, as must be assumed in view of the refusal to submit the questions of fact to the jury, we think the contract was rescinded and the plaintiff was not entitled to recover. The rescission was by mutual consent. The consideration was the release of each party from his liability under the contract and there was the further consideration that the defendants were induced to and did write a letter to and have communications and negotiations with Tynberg for placing the insurance. The plaintiff's assignors were not at liberty, after making this proposition to the defendants and after it was acted upon by the latter and all the conditions upon which the rescission of the contract was to take effect were complete, to withdraw the proposition even though the defendants had not then placed any of the insurance with Tynberg or legally obligated themselves so to do. They at least obligated themselves to consider seriously Tynberg's offer, and they as business men could not honorably ask Tynberg to execute the contract and procure the guaranty on the representation that they would consider his offer if they were not at liberty to consider it at all in their own behalf.

It follows, therefore, that the judgment and order should be reversed and a new trial granted, with costs to appellant to abide the event.

VAN BRUNT, P. J., PATTERSON and McLAUGHLIN, JJ., concurred; INGRAHAM, J., dissented.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

Louis H. Evans, Appellant, v. John H. Wrenn and Clarence Buckingham, Respondents.

Stockbroker and customer—duplication of orders to sell stock—meaning of words “I will have to let my stocks go”—it is an authorization not a direction—notice of election to exercise it is necessary—ambiguous instructions by a principal to an agent are at the risk of the former—manner of execution of a direction to sell stock—brokers liable for the misconduct of selling agents employed by them.

In an action against certain stockbrokers, whose place of business was in Chicago and who were represented in New York city by the brokerage house of Van Emburgh & Atterbury, by a customer of such stockbrokers, it appeared that the plaintiff's orders for the purchase and sale of stocks were given by him directly to Van Emburgh & Atterbury, who reported to the defendants at Chicago, by whom notices, etc., thereof were sent to the plaintiff.

It further appeared that defendants were carrying for the account of the plaintiff 2,000 shares of Rock Island, long, 500 shares of Atchison, long, and 500 shares of Rubber preferred, short; that in response to a telegram for more margins the plaintiff, who was at the office of Van Emburgh & Atterbury, telegraphed the defendants, “I will have to let my stocks go;” that the defendants then instructed Van Emburgh & Atterbury to sell 2,000 shares of Rock Island and 500 shares of Atchison, and to buy 500 shares of Rubber preferred, without stating that the transactions were for the plaintiff's account. The plaintiff also gave directly to Van Emburgh & Atterbury two separate orders each to sell 500 shares of Rock Island and a third order to sell 500 shares of Atchison. Upon the transactions being reported to the defendants, the latter, without consulting the plaintiff, instructed Van Emburgh & Atterbury to buy 1,000 shares of Rock Island and 500 shares of Atchison.

Held, that the plaintiff's telegram, “I will have to let my stocks go,” authorized the defendants to sell any or all of the plaintiff's stocks which they were carrying for him and to cover the stocks which they had sold for his account;

That if the language of the telegram was ambiguous the principle would apply that instructions from a principal to an agent should be expressed in clear

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language, and that if the language is not plain and unequivocal, but is fairly susceptible of different interpretations and the agent in fact is misled and adopts and follows one while the principal intended another, then the principal will be bound and the agent will be exonerated;

That such telegram was an authorization and not a direction to sell, and that, until the defendants had notified the plaintiff of their election to exercise the authority contained in the plaintiff's telegram, the plaintiff was at liberty to give orders directly to Van Emburgh & Atterbury;

That the defendants must, therefore, be regarded as having sold the duplicated stocks for their own account;

That when the plaintiff directed Van Emburgh & Atterbury to sell 500 shares of stock, the defendants did not contract to sell those shares in one block, but in the ordinary manner, viz., in 100-share lots;

That the defendants, although personally innocent, were chargeable with the misconduct of brokers, employed to sell stock for the account of the plaintiff, in selling such stock to themselves.

APPEAL by the plaintiff, Louis H. Evans, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 24th day of September, 1903, upon the report of a referee.

Alfred B. Cruikshank, for the appellant.

F. W. M. Cutcheon, for the respondents.

Judgment affirmed, with costs, on the opinion of the referee.

The following is the opinion of James L. Bishop, Esq., Referee :
BISHOP, Referee :

This controversy grows out of certain transactions in stocks which occurred on May 9, 1901, at the time of the so-called Northern Pacific panic.

The defendants are stockbrokers and members of the New York Stock Exchange, having a place of business at Chicago, and represented at New York by the stock brokerage house of Van Emburgh & Atterbury.

For some time prior to the transactions in controversy the plaintiff had been dealing in stocks at New York through the defendants, the transactions being conducted, however, through Van Emburgh & Atterbury as their representatives. The orders for the sales and purchases of stock were given direct to Van Emburgh & Atterbury, and were executed by them. They reported the

transactions to the defendants at Chicago, and the accounts were kept at Chicago from which place the usual notices and statements of the transactions were sent by the defendants to the plaintiff. The relation between the plaintiff and the defendants was that of customer and broker, although Van Emburgh & Atterbury were constituted agents to receive and execute the plaintiff's orders on behalf of the defendants.

All the sales and purchases which are the subject of this inquiry were made at the New York Stock Exchange under the rules and customs of the exchange.

On the 9th of May, 1901, at the opening of the market, the defendants were carrying for the plaintiff 2,000 shares of the stock of the Chicago, Rock Island and Pacific Railroad Company and 500 shares of the Atchison, Topeka and Santa Fe Railroad Company long, and 500 shares of the preferred stock of the United States Rubber Company short.

At the prices bid for these stocks at the opening of the market on that day the plaintiff would have had a credit balance of about \$28,000 with the defendants; that is, if his long stocks had then been sold and his short stocks bought in to cover, the defendants would have been indebted to him in about that sum.

The panic which occurred on that day was of short duration. It commenced after eleven o'clock and did not last beyond noon. There was a sudden — almost instantaneous — drop in prices and an almost immediate recovery. It was during this extraordinary break in prices that the transactions in question took place.

The plaintiff was at the office of Van Emburgh & Atterbury at the opening of the exchange, and remained there until about twelve o'clock. He was then absent for a short time, but returned and remained until the closing of the exchange. The offices of the defendants at Chicago were connected with the offices of Van Emburgh & Atterbury in New York by direct wire. The telegraph operators at the respective offices were in the habit of noting upon the back of dispatches the hour at which they were sent or received. At eleven twenty-five A. M. (I refer in every instance to New York time) the defendants telegraphed to the plaintiff, at Van Emburgh & Atterbury's offices, over this wire, "Please give us something." This dispatch was communicated to the plaintiff,

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and he understood it to be a request that he should furnish additional margins on his account. His statement is that he saw a dispatch reading, as he remembers it, "How about more margin?" It was on the telegraph operator's desk. He states that when he saw it he said, in the presence of Mr. Louis Atterbury, the manager of the office of Van Emburgh & Atterbury, "I guess I will have to let some of my stocks go." The operator sent a dispatch in reply, at eleven twenty-eight A. M., reading as follows: "I will have to let my stocks go."

I am satisfied from the evidence bearing upon the subject that the dispatch was sent in the language used by the plaintiff. It is extremely probable, however, that the plaintiff had in mind that he would sell, as had been his custom, through Van Emburgh & Atterbury, so much of his stocks as might be necessary, but the language in which he expressed himself was, I am satisfied, the language of the dispatch. I think this is convincingly established by the subsequent transactions and communications between the parties.

Within four or five minutes after the sending of this dispatch, the defendants telegraphed to Van Emburgh & Atterbury, "Sell 2,000 R. I.; 500 Atch. Com.," which was received and reported by the operator as an order to sell the stocks at the market, and a minute later the defendants telegraphed instructions to buy 500 Rubber preferred. These orders were transmitted by Van Emburgh & Atterbury to the floor of the exchange for execution.

Shortly after receiving the dispatch calling for more margins the plaintiff placed an order with Van Emburgh & Atterbury for the sale of 500 Rock Island, and a little later for the sale of another block of 500 Rock Island. He also gave an order for the sale of 500 Atchison, but he is not clear just when that sale was ordered, and in the view of the case which I have taken, I do not think it is important.

These orders, given directly by plaintiff to Van Emburgh & Atterbury, were also transmitted by them to the floor of the exchange for execution, and the particular sales made on these orders have been identified.

At about eleven forty-two A. M. Van Emburgh & Atterbury, having received a report of sale of 500 shares of Rock Island in

four parcels, three of 100 each and one of 200, telegraphed the defendants a report of these sales on account of Evans. This appears to have led the defendants to infer that sales were being made on the plaintiff's account, both on their order and on his direct orders given at New York. In any event, they forthwith telegraphed as follows: "We sent order to sell 2,000 R. I. & 500 Atch. Com. & to buy 500 Rubber pfd. This was acct. Evans. If he is giving the orders there don't duplicate and fix it up." To which Van Emburgh & Atterbury replied, "Evans has sold 1,000 R. I. and 500 Atch., so they have been duplicated," to which the defendants replied, "Buy them back at once if he did not." In the meantime all the orders sent into the exchange had been executed, with the result that sales had been made on the order of defendants of 2,000 Rock Island and 500 Atchison common, and on the direct order of plaintiff of 1,000 Rock Island and 500 Atchison common, and a purchase of 500 Rubber preferred had been made.

In reply to the last dispatch from the defendants Van Emburgh & Atterbury telegraphed, "We will then buy 1,000 R. I. & 500 Atch. at market. Is that O. K.;" to which the defendants replied, "Then buy only 1,000 R. I. and 500 Atch. Com. as that is all you reported as given to you by him."

This order to buy was also transmitted to the floor of the stock exchange and was there executed.

The plaintiff testifies that after he had given the orders to Van Emburgh & Atterbury to sell 1,000 Rock Island and 500 Atchison, he was informed by Louis Atterbury that the defendants had given an order to sell all his stock, and that the stock had been sold.

At about twelve forty-five p. m. the plaintiff telegraphed to the defendants as follows: "I had sold some R. I. & Atch. before your message came. When your message was received asking for money said I would sell stock," to which the defendants replied, "We have bot. the 500 Rubber pfd. We supposed from your message that you wanted to close your acct." The plaintiff then telegraphed, "What prices did you get on my acct.?" to which the defendants replied, "V. & A. sold on your direct order 100 R. I. 141; 100, 140½; 100, 134; 200, 133; 500, 125; 500 Atch. 60. We sold 1,000 R. I. in addition at 130 & bought 300 Rubber pfd.

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62 $\frac{1}{2}$ & 200 at 63." They subsequently telegraphed to the plaintiff as follows: "When you wired us first this morning you ought to have let us know that you were giving some orders to V. & A. yourself, direct. You said nothing whatever about it. Merely said, I will have to let my stocks go. So we wired V. & A. to sell them and the result was very disastrous loss on the 1,000 R. I. and 500 Atch. that we had to buy back. What can we expect on the balance of your acct.? Ans." The plaintiff answered, "I wired you that I would sell my stocks, in fact, had sold some of them before your message asking for margins arrived," to which the defendants replied, "No, if you had said you would sell them we would have understood it and avoided this bad loss in having to buy back same, but you said, 'I will have to let my stocks go,' and we presumed you were looking to us to give the orders."

Later in the day the plaintiff telegraphed to the defendants, "I repudiate your orders to Van Emburgh & Atterbury to sell my stocks to-day," and on the next day, before the opening of the market, he telegraphed to them, "I demand that you sell at the market to-day one thousand R. I. and buy five hundred Rubber preferred. Send statement."

One of the orders for the sale of 500 Rock Island given by the plaintiff to Van Emburgh & Atterbury was intrusted for execution to one La Montagne, a broker on the floor of the exchange. He bought all these shares on his own account at 125. Upon ascertaining this the defendants voluntarily credited the plaintiff's account with these shares and afterwards sold them on the plaintiff's order at 168 $\frac{1}{2}$. Another of the orders for the sale of 500 Rock Island, given by the plaintiff to Van Emburgh & Atterbury, was intrusted for execution to C. D. Belden, a broker on the floor of the exchange. He sold these shares in lots, to wit, 100 at 141, 100 at 140 $\frac{1}{2}$, 100 at 134 and 200 at 133. Of the latter 100 was taken by Belden on his own account, and it seems to be conceded that the plaintiff's account should be credited with these 100 shares. But the plaintiff insists that the sale of the entire 500 shares was effected by the wrongful act of Belden in taking over 100 shares on his own account, and that he is entitled to a credit for the entire 500 shares.

The plaintiff claims that he has sustained damages by reason of the unauthorized sale of either 1,500 or 1,100 shares of Rock Island,

depending upon whether he is to be credited with the prices realized on the above-mentioned 400 shares sold through Belden.

The basis of the plaintiff's contention is that the defendants had no authority to sell for him any other stocks than those for which he gave direct orders through Van Emburgh & Atterbury. The defendants, on the other hand, contend that they were authorized by the plaintiff's first telegram to sell all his stock, and to close out his account, and that they promptly proceeded to give orders to that effect, which were executed, and that the plaintiff thereafter had no authority to give orders to Van Emburgh & Atterbury to sell through the defendants, and that since the order so given by the plaintiff rendered it necessary for them to buy back the stocks which the plaintiff had ordered to be sold, the plaintiff should be chargeable with the loss which resulted therefrom.

If the plaintiff's contention is right, he is entitled to recover a considerable sum from the defendants, since if the sales which were irregularly made are eliminated, he is entitled to be credited with prices so much higher as to turn the balance of the account considerably in his favor.

If the defendants' contention is correct, the plaintiff is indebted to them, and they are entitled to recover upon one or the other of the counterclaims which they have set up.

The first question to be determined is the effect to be given to the plaintiff's telegram, "I will have to let my stocks go." I am of opinion that the plain import of these words, in the light of the situation of the parties, was to authorize the defendants to sell any or all of the plaintiff's stocks which they were carrying for him and to cover the stocks which they had sold for his account.

As I have already intimated, the plaintiff may not have understood the full import of this message when he sent it, but the message must be given effect according to the language used, and not according to the thought which may have remained unexpressed in the mind of the plaintiff.

Even if the language employed be considered ambiguous, it is susceptible of an interpretation to the effect that the defendants should let the stocks which they were carrying for the plaintiff go; that is, that they should sell them. The principle would then apply that instructions from a principal to an agent should be expressed in

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clear language, and that if not expressed in "plain and unequivocal terms, but the language is fairly susceptible of different interpretations and the agent in fact is misled and adopts and follows one, while the principal intended another, then the principal will be bound and the agent will be exonerated." (*Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185, 192, citing Story's Agency, § 74.) (See, also, *Ireland v. Livingston*, L. R. 5 H. L. 416; 1 Am. & Eng. Ency. of Law [2d ed.], 1001.)

The telegram which we have interpreted as an authority to the defendants to sell did not, however, terminate the authority which the plaintiff had to sell through Van Emburgh & Atterbury. It was an authorization and not a direction. The defendants had at most an option to sell, which, until its exercise was communicated to the plaintiff, was not inconsistent with a continuance of dealings by the plaintiff through Van Emburgh & Atterbury. When the defendants ordered the sale of 2,000 Rock Island and 500 Atchison common, they did not make known that it was on Evans' account. If they had done so, all danger of duplicating orders would have been avoided, and it was not until after the plaintiff had given his orders for the sale of 1,000 Rock Island and 500 Atchison common, and they had been accepted through Van Emburgh & Atterbury, that the defendants communicated the fact that their order for the sale of 2,000 Rock Island and 500 Atchison common was for the plaintiff's account. So it happened that they sold 1,000 Rock Island and 500 Atchison in excess of the stocks which they were carrying for plaintiff. It seems to me that as to these duplicated stocks, the defendants must be regarded as having sold them for their own account. It is quite clear that at that time they considered this to be the situation, since they at once ordered Van Emburgh & Atterbury to purchase 1,000 Rock Island and 500 Atchison to cover the excessive sales of these stocks. No authority was sought from or given by the plaintiff for the purchase of these stocks, and the defendants did not then take the position that they had bought these stocks for account of the plaintiff, or that they had sold the excess 1,000 Rock Island and 500 Atchison for his account. On the contrary, when the plaintiff telegraphed, "What prices did you get on my acct.?" the defendants replied, at one

twenty-five P. M., that they had sold on his direct order 100 Rock Island at 141, 100 at 140 $\frac{1}{2}$, 100 at 134, 200 at 135, 500 at 125 and 500 Atchison common at 60, adding: "We sold 1,000 R. I. in addition at 130," and in the account which they rendered to the plaintiff on May tenth they credited him with the stocks mentioned in their telegram and neither credited nor charged him with the excess 1,000 Rock Island and 500 Atchison, which they had bought and sold. Indeed, it was not until the account which was rendered on the eighteenth of July subsequent that they credited him with the duplicate sales and charged him with the purchase of the 1,000 Rock Island and 500 Atchison.

I am satisfied that the account as rendered on May tenth is a correct account of the transactions between the parties, except so far as it is to be corrected by reason of the misconduct of La Montagne and Belden in taking over for their own account the stocks which they were directed to sell. This misconduct is chargeable to the defendants, although they were personally innocent. So far as the La Montagne stock is concerned, they have acquiesced in the obligation, and have credited the plaintiff with 500 shares of stock in this transaction. These stocks were subsequently sold at 168 $\frac{1}{4}$. As to the Belden sale, I am of opinion that the plaintiff is entitled to be credited with the 100 shares sold by Belden to himself. This sale was made at 130. The plaintiff did not learn that this sale had been made by Belden to himself earlier than June, 1901. The price of Rock Island during the month of June went as high as 175 $\frac{1}{4}$. The plaintiff disaffirmed the sale apparently as early as June 6, 1901. On that day and the next the stock sold at 173. I think the plaintiff is entitled to be credited with the value of the stock at 173.

As to the other 400 shares of stock sold through Belden, I am of opinion that these sales are not open to objection. The sales were made in four distinct lots of 100 shares each. The purchasers are identified by Mr. Belden, and the plaintiff has not succeeded in showing that any of these purchases were in any respect irregular.

The plaintiff contends that the order was for the sale of the entire block of 500 shares, and that since the sale of a portion was fraudulent, the sale of the entire amount may be repudiated. It does not appear that the defendants contracted to sell the 500 shares

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as an entirety, but, on the contrary, it must be assumed that they took the order with the expectation of filling it in the ordinary way, by sales of 100-share lots. (*Marye v. Strouse*, 5 Fed. Rep. 483.)

Moreover, the sales were reported to the plaintiff immediately after they were made, and no objection was taken by him that they had been made in lots of 100 shares each. He acquiesced in the mode of sale adopted, and he should not now be permitted to repudiate the sales on that ground, to the prejudice of the defendants.

Crediting the plaintiff with 500 shares of Rock Island at 168 $\frac{1}{4}$ and 100 shares at 173, the account shows an indebtedness of the plaintiff to the defendants in the sum of eight thousand three hundred and fifty-seven and 93/100 \$8,357.93 dollars, with interest, for which the defendants are entitled to a judgment against the plaintiff.

Cases

DETERMINED IN THE

SECOND DEPARTMENT

IN THE

APPELLATE DIVISION,

April, 1904.

THOMAS W. ELDREDGE, Appellant, *v.* KATE P. MATHEWS, as Administratrix, etc., of JAMES F. MATHEWS, Deceased, Respondent.

Motion that a question of fact be submitted to the jury — it is seasonable when made after the direction of a verdict.

Where, at the close of the evidence, both parties move for the direction of a verdict, a motion made by the plaintiff, after the court has directed a verdict in favor of the defendant, for leave to go to the jury upon a disputed question of fact, is seasonably made.

APPEAL by the plaintiff, Thomas W. Eldredge, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 17th day of January, 1903, upon the verdict of a jury rendered by direction of the court after a trial at the Westchester Trial Term.

J. M. Fiero, for the appellant.

John Vernou Bouvier, Jr., for the respondent.

PER CURIAM:

This is an action upon a promissory note for \$2,500 made by the defendant's intestate on June 1, 1886, at Denver, in Colorado, while the maker was a resident of that State. The cause of action upon the note accrued on March 1, 1889. The maker died in New York January 7, 1899; the note and claim thereon were assigned to the

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plaintiff on February 6, 1900, and this action was commenced ten days later.

The defense was the Statute of Limitations. At the close of the evidence on both sides the plaintiff moved for the direction of a verdict on the ground that the defense had not been made out, and the defendant moved to dismiss the complaint upon the ground, among others, that the evidence showed without contradiction that from 1888 up to the time of his death in 1899 the decedent was a resident of the State of New York. The court thereupon directed a verdict for the defendant. The plaintiff excepted to the direction and asked to go to the jury upon the question of the residence of the decedent within the State of New York for six years preceding the 7th day of January, 1899.

The testimony was conflicting as to the time when the maker of the note became a resident of this State and as to the duration of his residence here. It was the contention of the plaintiff that the decedent had lived in Denver, Col., up to about 1889, and subsequently in Mexico and Texas up to October 1, 1896, when he became a resident of the city of New York at No. 80 Madison avenue. If the jury had found such to be the fact, the finding would have defeated the defense of the Statute of Limitations. We think there was testimony which, if credited by the jury, would have sustained a conclusion in accordance with this contention in behalf of the plaintiff, and, therefore that it was error to deny the request of his counsel to submit that question. The request was seasonably made (*Cullinan v. Furthmann*, 70 App. Div. 110), and in view of the conflicting evidence on the question of the residence of the maker of the note should have been granted.

For this reason the judgment must be reversed.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

ANNIE STELZ, Respondent, *v.* **FREDERICK VAN DUSEN**, Appellant.

Landlord and tenant — breach of a contract to repair, causing personal injuries.

An agreement by a lessor to repair the demised premises creates a purely contractual relation, and his failure to perform such agreement will not render him liable in damages for personal injuries sustained by the lessee's wife in consequence of such failure.

APPEAL by the defendant, Frederick Van Dusen, from a judgment of the City Court of the city of Mount Vernon in favor of the plaintiff, entered in the office of the clerk of said court on the 17th day of June, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 15th day of July, 1903, denying the defendant's motion for a new trial made upon the minutes.

J. Mortimer Bell, for the appellant.

Stephen J. Stilwell, for the respondent.

WILLARD BARTLETT, J.:

The plaintiff's husband leased from the defendant an entire house in the city of Mount Vernon. The plaintiff resided with her husband in this dwelling. She brought this action to recover damages for injuries alleged to have been sustained by the breaking of the flooring of the stoop in front of the house, alleging that said flooring had been rotten and out of repair for more than a year, and that her injuries were caused by the carelessness and negligence of the defendant in refusing and neglecting to repair the dangerous and defective flooring aforesaid. Upon the trial plaintiff's husband testified that he called the defendant's attention to the condition of the stoop and that the defendant, before the plaintiff and her husband moved into the house, promised to repair and put in a whole new stoop. The gravamen of the plaintiff's cause of action was the defendant's failure to fulfill this promise to repair.

No action for negligence was maintainable on this basis, and the complaint ought to have been dismissed. Assuming the making of the alleged agreement to repair, the breach thereof did not confer upon the tenant or his wife any right of action based upon negligence. The relation between the parties to the agreement was

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purely contractual, and the violation of the contract by the landlord did not create any liability in tort. (*Schick v. Fleischhauer*, 26 App. Div. 210 and cases there cited.)

The authorities relied upon by the respondent are readily distinguishable, most of them being cases in which the landlord had rented only a part of the building to the tenants therein, but had retained control over other parts, the law consequently imposing upon him the care thereof for the benefit of all the tenants.

The judgment should be reversed.

All concurred.

Judgment and order of the City Court of Mount Vernon reversed and new trial ordered, costs to abide the event.

ELIZA C. PARDINGTON, Respondent, v. ABRAHAM ABRAHAM and Others, Appellants.

Negligence—liability of the owners of a department store to a person struck by a swinging door.

In an action to recover damages for personal injuries it appeared that the defendants were proprietors of a department store, the entrance to which was fitted with swinging spring doors; that while the plaintiff was coming out of the store, another person, who had preceded her through one of the doors, let the door swing back and strike the plaintiff.

The proof showed that similar doors, with springs of the same or greater strength, were in use at numerous like establishments.

Held, that a judgment entered upon a verdict in favor of the plaintiff should be reversed, as the plaintiff's injuries could not be attributed to any fault on the part of the defendants, but rather to the hasty carelessness of a third person, over whose movements and conduct they had no control.

WOODWARD and HOOKER, JJ., dissented.

APPEAL by the defendants, Abraham Abraham and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 19th day of March, 1903, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the 13th day of March, 1903, denying the defendants' motion for a new trial made upon the minutes.

George Gordon Battle, for the appellants.

George G. Reynolds, for the respondent.

WILLARD BARTLETT, J.:

The plaintiff was injured by being struck by a swinging door, as she was coming out of the department store of the defendants. In her complaint she alleges that "in consequence of the negligent, unsafe and improper construction, arrangement and management of said door and of the springs attached thereto, said door swung back with great and dangerous force and struck the plaintiff a violent blow on the head and body." She testifies that, as she started to go out, the door was open, and just as she reached the sill, a woman who was ahead of her left the door and it flew back and knocked her down. The only other witness who testifies to actually having seen the accident was at the time a footman in the service of the defendants. He describes what happened as follows: "At the time that she was struck neither of those doors was fastened back any way. They were both swinging, unless in the warm weather they would be fastened back. I saw the person who came out just before her. She was a lady, and I saw her push the door in full force, and the other lady that was coming out back, she was like turned and looking at something in the show window and the door struck Mrs. Pardington." It is quite apparent from all the testimony concerning the occurrence that the motion of the door at the time it hit the plaintiff was due to the action of some other visitor to the store, who pushed open the door and let it swing back upon the plaintiff just as she reached the threshold.

For this action the defendants are not responsible, nor does it seem to me that they can be held liable for negligence on the ground that the construction or arrangement or management of the swinging doors was improper or unsafe. The proof showed that similar doors, with springs of the same or greater strength, are in use at numerous like establishments in the borough of Brooklyn and the borough of Manhattan. There does not appear to be anything about their construction or operation to make them dangerous to the customers of a department-store, provided ordinary and reasonable care is exercised in their use. That it is *possible* to use them so as to injure others is demonstrated by this very accident;

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but carelessness in the use of any form of door may inflict injury upon one who happens to be sufficiently near it.

No doubt the plaintiff has been the victim of a lamentable accident, but it is attributable, as it seems to me, not to any fault of the defendants, but rather to the hasty carelessness of a third person over whose movements and conduct they had no control.

In my opinion, therefore, the plaintiff has failed to make out a cause of action, and the defendants are entitled to a reversal of the judgment.

All concurred, except WOODWARD and HOOKER, JJ., dissenting.

Judgment and order reversed and new trial granted, costs to abide the event.

HENRY J. DUBOIS, Respondent, v. JOHN N. WILLIAMSON,
Appellant.

Evidence—what is objectionable as calling for matters of opinion or the witness' conclusions or for matter already testified to by the witness.

In an action brought to recover the value of materials furnished and labor performed by the plaintiff in constructing driven wells for the defendant, the following testimony was given by the plaintiff on his direct examination: "Q. Did they work well? A. Yes, sir; pumped free and all right a good quantity of water." Upon the defendant's redirect examination the following questions propounded to him were excluded: "Q. What has been the value of these wells to you?" "Q. Have you been able to use them at all?" "Q. Have you ever been able to use any water from these wells?" "Q. Have you ever used any water from these wells?"

Held, that the first three questions propounded to the defendant were objectionable, in that they called for matters of opinion or conclusions of the witness and not for statements of fact, and that the fourth question propounded to him was properly ruled out because the defendant had already testified that he had not used any of the water from the wells.

APPEAL by the defendant, John N. Williamson, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Suffolk on the 6th day of March, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 8th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

Frederic R. Kellogg [*Everett J. Esselstyn* with him on the brief], for the appellant.

Willard N. Baylis, for the respondent.

WILLARD BARTLETT, J.:

The plaintiff in this action recovered a verdict of \$1,208.05 as the value of materials furnished and labor performed by him under a contract with the defendant for the construction of a number of driven wells on the defendant's property at Little Neck, in Suffolk county. The principal issue litigated upon the trial and submitted to the jury was the question whether the agreement provided that the labor and material should be paid for as the work progressed, or whether it provided that water to the amount of 200 gallons a minute should be produced from the wells before the plaintiff would be entitled to any payment. No exception was taken to the charge, and the only questions raised upon the present appeal relate to the correctness of the rulings of the trial judge in excluding certain evidence sought to be elicited by the defendant.

These rulings relate to the following questions: "Q. What has been the value of these wells to you?" "Q. Have you been able to use them at all?" "Q. Have you ever been able to use any water from these wells?" "Q. Have you ever used any water from these wells?" These questions were put to the defendant upon his redirect examination, and in each instance the plaintiff's objection thereto was sustained and the defendant excepted.

In behalf of the appellant it is contended that the evidence which he sought to elicit was relevant for the purpose of meeting this testimony given by the plaintiff upon his direct examination: "Q. Did they work well? A. Yes, sir; pumped free and all right a good quantity of water." I am unable to perceive how the defendant's estimate of the value of the wells to him would tend in any manner to contradict this testimony given by the plaintiff, or how the mere fact that the defendant may never have used any water from the wells would tend to disprove the plaintiff's averments as to their capacity and adequacy. The questions as to the ability of the defendant to use the wells or the water therefrom were manifestly objectionable, as calling for a conclusion as to what the witness might think he could or could not do, instead of calling for a fact.

The proper method by which to controvert the testimony of the plaintiff which has been quoted would have been to inquire as to the manner in which the wells actually worked and whether they pumped freely and yielded a good quantity of water.

It is further argued that the questions were relevant as bearing upon the probability of the defendant's alleged acceptance of the wells. There was no allegation of acceptance in the complaint, nor was anything said on the subject by the learned trial judge in his charge. It is true that the plaintiff did testify that after two of the wells were finished and tested the defendant said they would do for screening sand or such use as he wanted them for ; "that they were all right." It may very well be that proof of the insufficiency of the wells would tend to render it improbable that the defendant expressed satisfaction with them, but this proof would have to consist of statements of fact and not mere matters of opinion or conclusions of the witness.

It will be observed that the only one of the questions which calls for any statement of fact is the fourth : "Q. Have you ever used any water from these wells ?" This question had really been answered before ; for the defendant had testified that he had made a test to see how much water he could draw from the wells, and that he pumped the first well dry in about five minutes ; the second one in a little less time, and the third one in about the same time. He had also stated that the first and second wells yielded only salt water, and that he was unable to get any fresh water from the third. It will thus be perceived that all the matters of fact which could properly have been sought for by the questions under discussion had already been fully laid before the jury ; and it seems to me quite clear that the rulings upon the first three questions were absolutely correct, irrespective of the evidence which had already been introduced in the case, and that the ruling upon the fourth question was right because the witness had already testified in effect that he had not used any of the water from the wells.

As the learned trial judge told the jury, there was no serious dispute as to the quantity of work done and materials furnished by the plaintiff ; and the case turned upon the question whether the contract was one which entitled the plaintiff to nothing until the final completion of the job, or one whereby the defendant undertook to

pay for the work as it went on; and the jury answered this question in favor of the plaintiff. In my opinion there is no warrant for interfering with their finding.

Judgment and order unanimously affirmed, with costs.

JEROME NISKERN, Respondent, *v.* THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, Appellant.

Accidental injury—dizziness and inability to continue work because of the hardening of the blood vessels of a certificate holder in a mutual benefit association.

Upon the trial of an action brought by the plaintiff, as a member of the defendant, a mutual benefit association, to recover a disability benefit which the constitution of the defendant provided that he should receive if he became permanently disabled for life by accidental injuries while working at his occupation as a carpenter, the plaintiff testified that he was building a porch over a stoop; that "I was putting up the frame and the rafters to it, and I had to climb up a ladder; I didn't have any scaffolding built, and I was taken very dizzy, and came nigh falling off the ladder, and I got down and stayed down quite a while, and made three or four attempts to get as far I could, and I couldn't make out with it. Then I went and got another man to help finish it. I did not fall off that ladder. I came very near to it. It was not a warm day."

His theory was that, on the occasion referred to, he was suffering from a hardening of the blood vessels of the body, known in medicine as arterial sclerosis, and that the strain to which he was subjected in lifting heavy timber ruptured a diseased blood vessel and produced a condition unfitting him for further labor at his trade.

Held, that the plaintiff had not established the existence of an accidental injury within the meaning of the defendant's constitution.

APPEAL by the defendant, The United Brotherhood of Carpenters and Joiners of America, from a judgment of the County Court of Westchester county, in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 30th day of March, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 18th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

Odell D. Tompkins, for the appellant.

David Swits, for the respondent.

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WILLARD BARTLETT, J.:

The plaintiff, as a member of the defendant corporation, which is a mutual benefit association, has recovered a verdict of \$200 against it under a provision of its constitution which entitles a member in good standing for a period of two years to receive a disability benefit of that amount upon becoming permanently disabled for life by accidental injuries while working at his occupation as a carpenter, and thereby totally incapacitated from ever again following the trade for a livelihood.

The plaintiff in his testimony describes the occurrence which is alleged to have resulted in his total incapacity to work any longer as a carpenter as follows: "It was in December, 1901. I was helping to build a porch over a back stoop of a house on North Seventh avenue. I think the name was Moore. I was working for myself and had been employed by the owner. I was putting up the frame and the rafters to it, and I had to climb up a ladder; I didn't have any scaffolding built, and I was taken very dizzy, and came nigh falling off the ladder, and I got down and stayed down quite a while, and made three or four attempts to get as far as I could, and I couldn't make out with it. Then I went and got another man to help finish it. I did not fall off that ladder. I came very near to it. It was not a warm day."

The theory of the plaintiff's case as presented on the trial was that he was suffering in December, 1901, on the occasion referred to in the testimony above quoted, from a hardening of the blood vessels of the body, known in medicine as arterial sclerosis, and that the strain to which he was subjected in lifting heavy timber ruptured a diseased blood vessel and produced a condition unfitting him for further labor at his trade.

In my opinion, the testimony of the plaintiff does not suffice to make out an accidental injury within the meaning of the defendant's constitution. It amounts to nothing more than a statement that he suddenly became dizzy while he was engaged in endeavoring to put up the frame and the rafters upon an addition to a house in course of construction. Nothing that can possibly be called an accident in the ordinary sense of that term appears to have occurred on this occasion. The most that by the most liberal inference can be deemed to have occurred is that he put forth an

effort in the performance of his work, which proved too much for him in his physical condition as then existing, and that he was consequently unable to prosecute his work any further. This result was in no sense an accidental injury.

In *Appel v. Aetna Life Insurance Company* (86 App. Div. 83) the death of the insured was shown to have been due to an injury to the appendix, incurred while riding upon a bicycle, and the Appellate Division in the fourth department held that the death was not produced by accidental means within the purview of the policy. Mr. Justice McLENNAN, who wrote the opinion of the court, pointed out that the plaintiff sustained no fall or shock, came into collision with nothing, went where he chose, selected his route, his wheel being at all times under perfect control, and brought into play only such muscles of the body as he willed; and he concludes that the result of the ride, while extraordinary, in no manner proved that it was accidental. "If the deceased had had a weak heart," he asks, "and had deliberately and in the usual way walked rapidly up a hill, which caused the heart action to stop, could it be said that death was the result of accident?"

Another case in point is *Southard v. Railway Passengers Assurance Company* (34 Conn. 574), which was an arbitration before Judge SHIPMAN of the United States District Court for the district of Connecticut. The claim was based upon a policy of indemnity against "bodily injuries, effected through violent and accidental means." The insured person was injured internally by jumping in haste from a railroad car at a station, and running a considerable distance. This action on his part was not necessary to his safety, but was voluntarily undertaken in order to keep an important engagement to meet another. Judge SHIPMAN held that the injury was not caused by accidental means within the terms of the policy, saying: "The degree of violence or force is not material, and had the insured, in this case, in jumping from the car, lost his balance and fell, or struck upon some unseen object and wounded himself, or, in running, had stumbled, or slipped on the ice, his injury might be attributed to accidental as well as violent means, and, assuming that there was no want of due diligence on his part, his misfortune would have been covered by the policy. But, as I have already stated, the injury which he received was in no sense the result of

accident. He jumped from the car with his eyes open, for his own convenience, and not from any perilous necessity. He encountered no obstacle in doing so. He alighted erect on the ground, just as he intended to do. * * *. No accident of any kind interfered with his movements, or, for an instant, relaxed his self control. All that he claims is, that, some hours after, it was discovered that a muscle in the walls of the abdomen had given way, under the strain to which he had voluntarily put it, under circumstances free from all peril or necessity. Assuming that this rupture was caused either by his jumping or running, or both, does not help the matter, unless we call running and jumping accidents."

Still another case, even more closely resembling the case at bar, is *Feder v. Iowa State Traveling Men's Association* (107 Iowa, 538), where the certificate holder, who had visited Denver while suffering from pulmonary consumption, died of a hemorrhage immediately after having endeavored to close the shutters of a window by standing upon a chair and reaching upward for that purpose. There was no evidence that he fell or slipped or lost his balance, or that anything occurred which was not contemplated by the deceased, except the rupture of the blood vessel which resulted in his death. The Supreme Court of Iowa held that the rupture was not accidental, within the meaning of the certificate and the constitution of the defendant providing for the payment of a benefit in case the death of the certificate holder resulted from an accidental cause. "If a person suffering from some weakness or disease," said ROBINSON, Ch. J., "should subject himself to conditions which would not injuriously affect persons in ordinary health, but would be dangerous to him, and injury result, it would not be due to an accidental cause. For example, if a person having a diseased heart should take violent exercise voluntarily, and death should result, the cause would not be accidental."

Many other authorities might be cited, a considerable number of which are referred to in this Iowa case, to show that the misfortune of the plaintiff herein cannot be attributed to an accident or an accidental cause in any legal sense of those terms. I am of opinion, therefore, that there was nothing to go to the jury in the case at bar, and that the complaint should have been dismissed. It may be added that the evidence tending to show that the plaintiff really

sustained any rupture of a blood vessel at the time of the alleged accident is extremely weak. His physician, who was called as a witness in his behalf and who examined him on January 10, 1902—less than six weeks after the occurrence narrated in the plaintiff's testimony—expressed the opinion that the condition in which he found the plaintiff on the occasion of his examination was not caused by any rupture of a blood vessel in the preceding December.

I advise a reversal of this judgment.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

RICHARDSON & BOYNTON COMPANY, Respondent, *v.* FANNY H. SCHIFF, Appellant.

Examination of a party before trial—appeal from the City Court of Yonkers to the Appellate Division—interest on the amount claimed, considered.

An order for the examination of a party before trial will be reversed where the moving papers do not show that such examination is either important or necessary.

Under section 1 of title 9 of chapter 416 of the Laws of 1898, which provides that appeals from the City Court of Yonkers shall not be taken to the Appellate Division of the Supreme Court unless the action is brought to recover \$100 or more, the Appellate Division has jurisdiction of an appeal from an order made in an action brought in the City Court of Yonkers to recover the sum of \$99 with interest, where, at the time the complaint was verified, such interest would raise the amount which the plaintiff sought to recover to a sum in excess of \$100.

APPEAL by the defendant, Fanny H. Schiff, from an order of the City Court of the city of Yonkers, entered in the office of the clerk of said court on the 30th day of December, 1903, denying the defendant's motion to vacate an order theretofore entered herein for the examination of the defendant before trial.

Stephen Fraser Thayer, for the appellant.

Ralph Earl Prime, Jr., for the respondent.

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WILLARD BARTLETT, J.:

The papers upon which the order for the examination of the defendant before trial was granted fail to show that it was either important or necessary that her testimony should be taken before rather than at the trial. It has so often been held that such a defect is fatal to an order of this character that the citation of authorities on the point is unnecessary.

The respondent objects, however, that this court has no jurisdiction to entertain the appeal. The act of the Legislature regulating appeals from the City Court of Yonkers provides that such appeals shall be heard by the County Court of Westchester county where the judgment is rendered or the order appealed from is made in an action in which a recovery of less than \$100 is demanded in the complaint, but where a recovery of \$100 or more is demanded, such appeals may be taken to the Second Department of the Appellate Division of the Supreme Court. (Laws of 1893, chap. 416, tit. 9, § 1.) The complaint in the present action was verified on October 27, 1903. The plaintiff therein demands judgment against the defendant for the sum of \$99 with interest thereon from November 8, 1902. It will be perceived that this interest at the legal rate would raise the amount which the plaintiff sought to recover at the time the complaint was verified to a sum in excess of \$100. I think the demand was, therefore, sufficient in amount to give this court jurisdiction of the appeal.

The order appealed from should be reversed, with ten dollars costs and disbursements.

All concurred.

Order of the City Court of Yonkers reversed, with ten dollars costs and disbursements, and motion granted, with costs.

ANSON CASSAVOY, Respondent, v. WILLIAM L. PATTISON, Appellant.

Slander—charge of dishonesty—it is not actionable per se unless spoken in reference to the person's occupation or business—nor is a charge that a man lived with an adopted daughter and left his wife alone, or that an acquaintance would be sorry that she ever met him.

An oral charge of dishonesty is not slanderous *per se* and will not support an action for slander, unless it relates to the plaintiff in a special character or occasions special damage.

Consequently, where the complaint in an action of slander based on such an accusation contains no allegation that the words in question were spoken of the plaintiff in reference to any occupation or business, or that the plaintiff had any occupation or was engaged in any business, the complaint is demurrable. Oral statements that a man was accustomed to live with his adopted daughter for periods of a week at a time, leaving his wife at home alone, and that a woman acquaintance would be sorry that she ever met him, are not actionable *per se*, and a complaint in an action of slander based upon such statements is demurrable where it contains no averment that they were uttered in reference to the plaintiff's calling or that they affected him in his business character.

APPEAL by the defendant, William L. Pattison, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 4th day of April, 1903, upon the decision of the court, rendered after a trial at the Westchester Special Term, overruling the defendant's demurrer to the fifth and sixth causes of action set forth in the complaint.

The causes of action attacked by the demurrer are as follows:

"V. * * * That on or about the 18th day of November, 1901, and on many other occasions during the year 1901, at the Village of Peekskill in said county, the defendant, in the presence and hearing of one Hanford Smith, did wickedly and maliciously speak of and concerning this plaintiff, the false and defamatory words following, that is to say: 'Be careful how you deal with that man Cassavoy, he is dishonest and he will do you if he can,' thereby charging and intending to charge this plaintiff with being dishonest in business transactions and with having the intent of defrauding the persons with whom plaintiff should do business. * * * That the said words were wholly false and untrue. * * * That by means of the premises aforesaid the plaintiff has sustained great damage, and by means thereof divers other persons who before the time of the

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committing of the said grievances had been used and accustomed to deal with the plaintiff in the way of his aforesaid business to the great profit and advantage of said plaintiff, have from thence hitherto wholly neglected and refused, and do still neglect and refuse, to continue such customer or to deal with the plaintiff, who has, by means of the premises been greatly injured in his reputation and credit as a business man and otherwise, and been otherwise greatly injured and damnified to his damage in the sum of One Thousand Dollars.

“VI. * * * That at divers times between the first day of January, 1901, and the first day of January, 1902, at Peekskill, N. Y., and at the home of one Mrs. M. H. Michaels, No. 440 West 22nd street, in the City of New York, the defendant, in the presence and hearing of the said Mrs. M. H. Michaels and of divers other persons did wickedly and maliciously speak of and concerning this plaintiff the following false and defamatory words following, to wit, that is to say: ‘That he’ (meaning this plaintiff) ‘had an adopted daughter now the wife of one Edward Palmer, and that he’ (meaning the plaintiff) ‘was accustomed to go off and live with the said adopted daughter for periods of a week at a time, leaving his wife at home alone;’ and that upon the said occasion the said defendant did further speak of and concerning this plaintiff in the following false and defamatory manner, thus: ‘That she’ (meaning the said Mrs. Michaels) ‘would be sorry that she had ever met this plaintiff in the south;’ thereby charging and intending to charge, and being understood by the persons hearing the said words as charging this plaintiff with being an unfit person for her to associate with or to continue upon her list of acquaintances. * * * That said words were wholly false and untrue. * * * That by reason of the premises aforesaid the plaintiff has been greatly injured in his good name, fame and credit in the sum of One Thousand Dollars.”

Franklin Couch, for the appellant.

Nathan P. Bushnell [*Robert McCord* with him on the brief], for the respondent.

WILLARD BARTLETT, J.:

This is an action for slander. The oral accusation of dishonesty set out in the fifth cause of action is not slanderous *per se*, and no

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action will lie for the utterance of such a charge by word of mouth unless it relates to the plaintiff in a special character, or occasions special damage. (See definition of slanderous words, per ANDREWS, J., in *Moore v. Francis*, 121 N. Y. 199, 203.) There is no allegation that the words in question were spoken of the plaintiff in reference to any occupation or business, nor is there any averment that he had any occupation or was engaged in any business. These omissions are fatal to the statement of the cause of action. "It is not enough that the words may tend to injure him in his office or calling, unless they are spoken of him in his official or business character;" and this must be supported in the complaint. (*Van Tassel v. Capron*, 1 Den. 250, 252.) "Any charge of dishonesty, against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. If spoken of him individually, and not in connection with his office or business, these words would not be actionable." (*Fowles v. Bowen*, 30 N. Y. 20, 24.) So, also, it is necessary that the complaint, where the cause of action is of this character, shall show that the plaintiff at the time of the alleged slander was engaged in the office or business which he claims was injuriously affected by the utterance of the defamatory words. "Where an action is brought for words (not actionable in themselves), spoken of a person in a particular calling, or profession or employment, it must appear that he followed such profession or employment when the words were spoken." (*Forward v. Adams*, 7 Wend. 204, 208.)

As to the sixth cause of action, it seems to me clear that the defamatory words therein alleged to have been spoken by the defendant concerning the plaintiff cannot in any view be regarded as actionable *per se*, and there is no averment that they were uttered in reference to the plaintiff's calling or that they affected him in his business character.

I think the demurrer should have been sustained as to both causes of action.

All concurred.

Interlocutory judgment reversed and demurrer sustained, with costs.

In the Matter of Proving the Last Will and Testament and Codicil of ANNIE SHANNON, Deceased, as a Will of Real and Personal Property.

EUPHEMIA McHUGH, as the Executrix and Residuary Legatee Named in the Last Will and Testament of ANNIE SHANNON, Deceased, Appellant; JOSEPH SHANNON and EUGENE SHANNON, Respondents.

Probate of will — a jury trial will be ordered where the surrogate's determination is unsatisfactory.

Where the action of a Surrogate's Court in passing upon an application for the probate of a will is not entirely satisfactory to the Appellate Division, that court will send the issues of fact upon which the right to probate depends to a jury for determination.

APPEAL by the petitioner, Euphemia McHugh, as the executrix and residuary legatee named in the last will and testament of Annie Shannon, deceased, from a decree of the Surrogate's Court of the county of Richmond, entered in said Surrogate's Court on the 20th day of April, 1903, refusing to admit to probate instruments propounded as the last will and testament and the codicil thereto of Annie Shannon, deceased.

David P. Hall [P. Van Alstine with him on the brief], for the appellant.

J. Travis King, special guardian of Anna Maria Johnson.

A. J. Moore, for the respondents.

PER CURIAM:

The learned surrogate has refused probate to the paper writings propounded as the last will and testament of Annie Shannon, deceased, and a codicil thereto, on two grounds, as indicated by his findings: (1) That the testamentary capacity of the decedent was not sufficient to make a will, or to understand the provisions of the papers propounded as her last will and codicil; and (2) that at the time of the execution of the instruments the decedent was a weak and feeble-minded woman, and executed the same "under an improper influence exercised over her by the proponent herein."

The reasons which led to the conclusion that the decedent was lacking in testamentary capacity are set out by the surrogate in a carefully written opinion which appears in the record. The view which seems to have controlled the court below was that there was no evidence in the case sufficient to warrant a finding that the decedent realized the effect which the residuary clause of the will would have in disposing of her property. By the 4th paragraph of the will she bequeathed \$200 to Euphemia McHugh, who was nominated as executrix, for her kindness, care and attention to herself and her sisters during illness; and by the 7th paragraph she bequeathed the rest, residue and remainder of her personal estate to the said Euphemia McHugh for her own use and benefit forever. It appears that the effect of this residuary clause was to give Mrs. McHugh a sum amounting to between \$5,000 and \$6,000 in addition to the specific legacy of \$200. The learned surrogate thought that only one conclusion could be arrived at in respect to this residuary bequest, and that was that "this sick, weak-minded woman believed that, in making the specific legacies which she did, she was disposing of her estate. She did not comprehend the amount of her estate, or what a residuary legatee meant, and to that extent did not understand the contents of the will."

Nothing is said in the opinion upon the question of undue influence, although, as has been pointed out, there is a finding that the decedent made the will and codicil under "an improper influence" exercised over her by Euphemia McHugh. We are unable to find in the record any evidence sufficient to warrant the inference that the execution of either the will or the codicil was the result of undue influence. As to the denial of probate on the ground of lack of testamentary capacity, we deem it very doubtful whether the disposition of the case made in the court below ought not to have been different. The rule which should control the decision of this appeal, therefore, is that stated by Mr. Justice JENKS in *Matter of Tompkins* (69 App. Div. 474) and the authorities cited in his opinion, to the effect that in a probate proceeding, where the action of the Surrogate's Court is not entirely satisfactory, the issues of fact upon which the right to probate depends should be sent to a jury for determination. That course should be followed in the present case.

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There must, therefore, be a reversal of the decree appealed from, and an order directing the trial before a jury, in the Supreme Court in Richmond county, of the following questions:

(1) Did the decedent, Annie Shannon, at the time of the execution of the instruments propounded in this proceeding as her last will and testament and a codicil thereto, have testamentary capacity?

(2) Was the execution by the decedent of these instruments or either of them procured by undue influence practiced upon the decedent?

All concurred.

Decree of the Surrogate's Court of Richmond county reversed, and trial of questions of fact directed before a jury.

THOMAS A. ENNIS and CHARLES F. STOPPANI, Composing the Firm of ENNIS & STOPPANI, Respondents, v. MAURICE UNTERMYER, Appellant.

Attachment — affidavit on information and belief that defendant had made no designation of a person on whom service could be made — sustained by an informal county clerk's certificate — failure of a warrant to recite the grounds thereof.

Where the affidavit, used on a motion for a warrant of attachment under subdivision 2 of section 686 of the Code of Civil Procedure, alleges, on information and belief, that the defendant, having been absent from the State for more than six months, had filed no designation, pursuant to section 480 of the Code of Civil Procedure, of a person upon whom process could be served on his behalf, as appeared by a certificate of the county clerk annexed thereto, a certificate annexed to the affidavit, in which the county clerk states under written directions to make a search in his office for such a designation, "nothing found," constitutes, although the certificate is not in such a form that it can be used as evidence, a sufficient basis for the affiant's information and belief. The failure of a warrant of attachment to recite the grounds thereof is merely an irregularity, and the omission is not available to the defendant on a motion to vacate the attachment unless it is specified in the notice of motion.

HOOKER, J., dissented.

APPEAL by the defendant, Maurice Untermyer, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 2d

day of February, 1904, denying the defendant's motion to vacate and set aside warrants of attachment theretofore issued herein.

Louis Marshall, for the appellant.

Treadwell Cleveland, for the respondents.

WILLARD BARTLETT, J.:

This appeal is based upon two propositions : (1) That the plaintiffs have not established the existence of the jurisdictional fact that the defendant has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed by section 430 of the Code of Civil Procedure ; and (2) that the warrants do not comply with section 641 of the Code, because they do not recite any grounds of attachment recognized by the Code.

Subdivision 2 of section 636 of the Code of Civil Procedure, among other things, provides that an attachment may issue "where the defendant, being an adult and a resident of the State, has been continuously without the State of New York for more than six months next before the granting of the order of publication of the summons against him, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section four hundred and thirty of this act." These warrants of attachment against Mr. Untermyer were sought on the ground that he was an absentee under this provision. The evidence that he had not made the prescribed designation is found in the following statement in the affidavit of Mr. Ennis, one of the plaintiffs :

"I have caused a search to be made in the office of the clerk of the County of New York, and I am informed and believe that the said defendant has not made a designation of a person upon whom to serve a summons on his behalf, as prescribed by section 430 of the Code of Civil Procedure, as appears by the certificate of said clerk hereto annexed." The certificate annexed to the affidavit is as follows :

"NEW YORK CITY, December 10th, 1903.

"To THOMAS L. HAMILTON,

"Clerk of the County of New York :

"Please search in your office for the designation of a person upon whom service can be made on behalf of Maurice Untermyer (filed

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pursuant to the terms of Section 430 of the Code of Civil Procedure) from November 27th, 1877, to the date hereof and certify the result to

“CLEVELAND & CLEVELAND,
“27 William Street.

“Nothing found to December 10th, 1903, at 9 A. M.

“[SEAL]

THOMAS L. HAMILTON, *Clerk.*

We think that this certificate, although not capable of being used by itself as evidence, constituted a sufficient basis for the affiant's assertion of information and belief in his affidavit. In other words, the declaration by the county clerk in this form was information which “he had a right to consider well founded,” and upon which the court could exercise jurisdiction. (*Hawkins v. Pakas*, 39 App. Div. 506.)

The second point, to the effect that the warrants do not sufficiently recite the grounds of the attachment, is not available to the appellant, inasmuch as the omission, if there be one, is merely an irregularity and is not specified in the defendant's notice of motion. (*King v. King*, 68 App. Div. 189; *Rallings v. McDonald*, 76 id. 112.)

The order refusing to vacate the warrants should be affirmed.

All concurred, except HOOKER, J., dissenting.

Order affirmed, with ten dollars costs and disbursements.

JOHN E. ANDRUS, Respondent, v. THE NATIONAL SUGAR REFINING COMPANY and THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellants.

Easement created by grant — not destroyed by non-user — it may be by adverse user.

Mere non-user will not suffice to destroy an easement in land acquired by grant; a right of way created by grant may, however, be lost by adverse user where the user is exclusive of the interest of the grantee and in open hostility to his claim.

APPEAL by the defendants, The National Sugar Refining Company and another, from a judgment of the Supreme Court in favor

of the plaintiff, entered in the office of the clerk of the county of Westchester on the 11th day of July, 1903, upon the decision of the court, rendered after a trial at the Westchester Special Term, in an action to establish a right of way and to enjoin the defendants from obstructing the same by means of a railroad siding.

Ralph E. Prime, for the appellants.

Isaac N. Mills, for the respondent.

PER CURIAM:

This case has been before us on a previous appeal. (*Andrus v. National Sugar Refining Co.*, 72 App. Div. 551.) It has been retried, in accordance with the view of the law then expressed by Mr. Justice JENKS, and has resulted in a judgment for the plaintiff declaring him to be entitled to the right of way which he claims and granting other relief. We have been asked, upon the appeal from this judgment, to reconsider and reject the legal propositions involved in our former decision; and in deference to the learned counsel for the appellants we have carefully reviewed them in the light of the new arguments which he has presented. These have not seemed cogent enough, however, to lead us to any different conclusion; and so far as any question is concerned which was dealt with by this court upon the first appeal we adhere to the opinion then handed down.

Several new points, going to the maintenance of the action, have been made upon the present argument, most of which, however, although not directly discussed in our former opinion, are nevertheless sufficiently answered in the observations and suggestions therein contained. It is now argued in addition that any right of way which the plaintiff or his grantors ever had has been lost by non-user or adverse possession. Mere non-user will not suffice to destroy an easement in land acquired by grant (*Welsh v. Taylor*, 134 N. Y. 450), although there is no doubt that a right of way, created by grant, may be lost by adverse use, where the use is exclusive of the interest of the grantee and in open hostility to his claim. (*Smyles v. Hastings*, 22 N. Y. 217.) The evidence in this record, however, does not seem to us to make out a case of adverse possession within this rule. We are clear that the judgment is right on the merits in

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its main features, but we agree with counsel for the appellants that it is in some respects too broad in its terms. It does not sufficiently appear that the maintenance of a railroad track by the defendants upon the strip of land in question will necessarily interfere with the free and unobstructed enjoyment of the right of way to which the plaintiff is entitled. It is quite conceivable that the presence of a properly-constructed track will not constitute any obstacle to the use of this strip by the plaintiff for all reasonable purposes; nor need the passage of cars over such tracks from time to time create any real obstruction, though, of course, the defendants should be prohibited from allowing cars to stand upon the track.

The judgment should be modified by striking out the provisions thereof numbered two, three and four, relative to the railroad track, and by inserting in lieu thereof an injunction against obstructing the right of way by allowing cars to stand thereon. As thus modified it should be affirmed, without costs of this appeal to either party.

All concurred.

Judgment modified, in accordance with opinion per curiam, and as modified affirmed, without costs of this appeal to either party.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* JOSEPH CANEPI, Jr., Appellant.

Poolselling — proof sustaining a conviction thereof — instruction to the jury as to the punishment therefor.

Upon the trial of an indictment, charging the defendant with the crime of poolselling in violation of section 351 of the Penal Code, no evidence was given that the defendant actually engaged in poolselling himself. Testimony was, however, given to the effect that on the day mentioned in the indictment, poolselling was conducted in a building occupied by the defendant as a liquor saloon; that for a period of five minutes defendant was present in the room talking with one Cunningham, while the latter was engaged in hanging up cards bearing the names of the horses entered for each race; that on the day previous to that charged in the indictment, the defendant exercised control over the room by refusing to allow a police officer to enter it, and that a telephone found in the pool room had been placed there upon the application of the defendant.

Held, that the evidence was sufficient to sustain a finding that the defendant assisted and abetted poolselling;

That it was not error for the court to instruct the jury as to the punishment which could be inflicted upon the defendant if he were found guilty.

APPEAL by the defendant, Joseph Canepi, Jr., from a judgment of the County Court of Westchester county, entered in the office of the clerk of the county of Westchester on the 1st day of June, 1903, upon the verdict of a jury convicting the defendant of the crime of poolselling in violation of section 351 of the Penal Code.

David H. Hunt, for the appellant.

J. Addison Young, for the respondent.

WILLARD BARTLETT, J.:

There is no evidence in this case that the defendant actually engaged in poolelling himself; but I think the proof is sufficient, within the rule which requires the establishment of criminality beyond a reasonable doubt, to sustain the finding that the defendant on the day charged in the indictment (July 26, 1902) assisted and abetted poolselling in violation of section 351 of the Penal Code, and, hence, that he became liable as a principal. (See Penal Code, § 29.)

The defendant went to the jury without offering any evidence whatever. The proof in behalf of the prosecution showed that on July 26, 1902, in a room upstairs in a building at Yonkers occupied by the defendant as a liquor saloon, poolselling on the horse races at Brighton Beach was going on; that cards were brought from behind a partition in this room and hung on the wall by a man named Cunningham, which cards bore the names of the horses entered for each race and were consulted by the persons in the room before they made their bets; that for a period of five minutes the defendant was present in the room talking with Cunningham while the latter was engaged in hanging up these cards, and that the defendant exercised control over access to this room, having on Friday, July 25, 1902, refused to allow a police officer to enter it, but saying that the officer could do so on the following Monday, adding: "I am through. Mrs. Engle is going to take the rooms. * * * I am going to hire the rooms to Mrs. Engle." This was

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after the policeman had told Canepi that he heard he was running a poolroom, and Canepi had told him that nothing of the sort was going on.

The evidence introduced by the People further showed that a telephone found in the poolroom had been placed there upon the application of the defendant. The telephone contracts, which the defendant signed, contained the following words, under the heading **Matters for Subscribers' List** : "Canepi, Joseph, Jr., St. James, 12 Palisade Avenue." The witness who testified to Canepi's presence with Cunningham in the poolroom received from the hand of an unseen person behind a partition therein a ticket as a voucher for the money which he bet on one of the races, and upon the face of this ticket were printed the words "St. James Club."

Without a further review of the testimony, I think it sufficient to say, so far as the facts are concerned, that this record clearly establishes the defendant's complicity in the conduct of poolselling upon the premises under his control.

Some questions of law are raised which it is necessary to notice. The learned counsel for the defendant likens this case to that of *People v. Shannon* (87 App. Div. 32), where we reversed a judgment of conviction upon the same indictment. The defect in that case, however, was the failure to prove Shannon's presence on any day when pools were sold, although there was evidence that pools were sold on days when the testimony did not show that he was present. The effort there was to establish Shannon's active participation in the selling of pools, and we held that the trial court erred in refusing to charge the jury that they must not find him guilty unless they found that he was engaged in poolselling on July 26, 1902. Here, Canepi was proved to have been present in the poolroom on that date, one important step in the selling of pools being taken in his presence by the person with whom he was conversing at the time, while the other evidence to which reference has been made shows that he was the protector, if not the principal promoter, of the poolselling business.

Just before the jury retired the following colloquy occurred between counsel and the court: "Mr. YOUNG: When your honor read the statute in full you stated the penalty. I ask your honor to charge the jury that under the statute the crime is punishable by

fine or imprisonment. Mr. HUNT: Objected to. The COURT: I have read the statute. I read the statute that the defendant might be imprisoned in State's prison for not exceeding two years, and that he might be fined for an amount not exceeding two thousand dollars. That means from imprisonment of from one to two years—not from one day up; or it means a fine of from one cent up to two thousand dollars. It cannot be both. [Exception to defendant.] Mr. HUNT: I ask your honor to charge that your statement—having charged on this subject the fine may be from one cent, is no intimation to the jury that your honor will fine one cent. The COURT: No; I don't give any intimation to the jury what I will do."

It is not suggested that the final statement of the learned county judge as to the penalty prescribed by law was incorrect, but it is argued that it was error to give the jury any instruction whatever as to the punishment, the idea apparently being that they may have been influenced to convict by the impression that the district attorney would ask for only a light sentence. This view strikes me as rather fanciful. I can hardly see how this jury can have been misguided by being told simply what were the possible consequences of a conviction at their hands. The case is not at all like *People v. Chartoff* (72 App. Div. 555), where the objection to the instruction on the subject of punishments was that it permitted the jury to assume that different and less stringent rules applied to the conduct of a trial for a misdemeanor than to the conduct of trials for offenses which the law punishes more severely. There was no comparison of the sort here, and I cannot assent to the doctrine that it is legal error to tell a jury what the Legislature has put into the statute book in reference to the punishment of the very crime of which they are called upon to take cognizance.

I find no errors in this record affecting the substantial rights of the defendant, and, therefore, conclude that the judgment should be affirmed.

All concurred.

Judgment of conviction affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. JAMES MURPHY, Respondent.

Manslaughter — what indictment sufficiently alleges the causal connection between the death and the act of the accused — when the time of the commission of the crime is sufficiently stated.

An indictment for manslaughter in the second degree charged as follows: "That the said James Murphy did on the day aforesaid wilfully and feloniously break, loosen, disengage, or otherwise wilfully and feloniously interfere with the rigging, mechanism and physical apparatus, whereby a certain live electric arc-light and the current-charged wires thereto attached, situated on the Richmond Turnpike in said County and near Linoleumville, could be lowered from their usual safe positions to points unsafe and dangerous; and that the said James Murphy by such breaking, loosening, disengaging or interfering did so cause the said current-charged wires and live electric arc-light to become lowered from their usual safe positions; and that subsequently one August Klein did come in contact with said live arc-light or wires so lowered, and that he was then and thereby killed. The said act having been committed by the said James Murphy without a design to effect death, but by his act, procurement or culpable negligence."

Held, that the allegation that Klein "was then and thereby killed" might be construed as qualifying not only the allegation immediately preceding it, but also the prior allegation that the defendant lowered the light and wires;

That, as thus construed, the indictment sufficiently alleged the causal connection between Klein's death and the lowering of the light and wires;

That the averment that "subsequently one August Klein did come in contact with said live arc-light or wires so lowered" alleged the time when the crime was committed with the certainty required by sections 280 and 284 of the Code of Criminal Procedure;

That such allegation was tantamount to an averment that Klein's death occurred on the same day that the light and wires were lowered.

APPEAL by the plaintiff, The People of the State of New York, from a judgment of the County Court of Richmond county in favor of the defendant, bearing date the 18th day of November, 1903, and entered in the office of the clerk of the county of Richmond upon the decision of the court sustaining the defendant's demurrer to an indictment for manslaughter in the second degree theretofore filed herein, on the ground that the facts stated in such indictment do not constitute a crime.

The indictment which was held to be insufficient upon the demur-
rer was as follows: "The Grand Jury of the County of Richmond,
by this Indictment, accuse James Murphy of the crime of man-

slaughter in the second degree, committed as follows: The said James Murphy, late of Linoleumville, in the Third Ward of the Borough of Richmond, City of New York, and in the County of Richmond aforesaid, on or about the twenty-seventh day of November, in the year of our Lord one thousand nine hundred and two, at the place and county aforesaid, for that the said James Murphy did on the day aforesaid wilfully and feloniously break, loosen, disengage, or otherwise wilfully and feloniously interfere with the rigging, mechanism and physical apparatus, whereby a certain live electric arc-light and the current-charged wires thereto attached, situated on the Richmond Turnpike in said County and near Linoleumville, could be lowered from their usual safe positions to points unsafe and dangerous; and that the said James Murphy by such breaking, loosening, disengaging or interfering did so cause the said current-charged wires and live electric arc-light to become lowered from their usual safe positions; and that subsequently one August Klein did come in contact with said live arc-light or wires so lowered, and that he was then and thereby killed. The said act having been committed by the said James Murphy without a design to effect death, but by his act, procurement or culpable negligence against the form of the statute in such case made and provided, and against the Peace of the People of the State of New York, and their dignity."

Edward Sidney Rawson, for the appellant.

Thomas C. Brown, for the respondent.

WILLARD BARTLETT, J.:

No opinion was written by the learned county judge in allowing the demurrer in this case. The argument before us, however, indicates that it was deemed fatally defective in two respects: (1) Because it failed to set forth any causal connection between the negligent act of the defendant and the death of the alleged victim; and (2) because it did not sufficiently fix the time when the alleged victim was killed by coming in contact with the electric wire.

The respondent insists that it is indispensably necessary in an indictment for negligently causing the death of a person to aver that the death ensued in consequence of the defendant's negligent act, and in support of this proposition he cites Wharton on Criminal

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Law (10th ed. § 1580); *State v. Wimberly* (3 McCord, 190); *State v. Blan* (69 Mo. 317), and 41 Texas, 496, and 85 North Carolina, 581, without naming the cases.* He quotes Wharton as saying: "To sustain a conviction for a crime produced by a negligent act, a causal connection must be alleged and established between the act and the result." These are not the exact words of that author in section 1580 of the 10th edition, by Wm. Draper Lewis, Ph. D., published in 1896. The passage cited, as it appears in said edition, reads as follows: "To sustain a conviction for a crime produced by negligence, a causal connection, under conditions which have been already set forth, must be established between the negligence and the crime." It will be observed that the word alleged, which appears in the brief for the respondent, does not appear here. It is undoubtedly true, however, that some of the cases cited in support of the judgment on this demurrer hold that in indictments for murder and manslaughter it is indispensably necessary to state that the death ensued in consequence of the act of the defendant. But as was said by the Court of Appeals of South Carolina in asserting this rule in *State v. Wimberly* (*supra*), "the pleader is not confined to any precise phraseology, except when technical words are necessary in the description to give character to the offence. It is sufficient if the idea is clearly and distinctly expressed, for neither clerical nor grammatical errors will vitiate, unless they change the word or obscure the meaning." It is not necessary to do more, however, than to allege the substantive facts necessary to be proved. (*State v. Blan*, *supra*.) As to the Texas and North Carolina cases cited in the respondent's brief, I can find nothing at the pages respectively indicated which has any possible bearing upon the questions at issue here.

It must be admitted that it would have been better pleading to allege in this indictment in express terms that the death of August Klein occurred as a result or in consequence of the act of the defendant James Murphy in causing the current-charged wires and live electric arc light to become lowered from their usual safe position. I am of opinion, however, that, notwithstanding the omission of such express terms, the fair meaning and intendment of the language

*See *Edmondson v. State*, 41 Tex. 496, and *State v. Morgan*, 85 N. C. 581.—[REP.]

used by the pleader is equivalent in effect to such an averment. The allegation that Klein "was then and *thereby* killed" may be so construed, I think, as to regard the word "*thereby*" as qualifying not only the immediately preceding allegation, but also the prior allegation that the defendant caused such arc light and wires to become lowered from their usual safe position; that is to say, the meaning is that Klein was killed by reason of the lowering of the light and wires, followed by his subsequent contact therewith.

As to the question of time, the contention is that the averment that "subsequently one August Klein did come in contact with said live arc-light or wires so lowered," is not a statement of the time when the crime was committed, with the certainty required by law. (*People v. Stocking*, 50 Barb. 573, 586.) The existing rule on the subject, however, is prescribed by the Code of Criminal Procedure, which provides in section 280 as follows: "The precise time at which the crime was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the crime." Section 284 of the same Code further provides that the indictment is sufficient, if it can be understood therefrom "that the crime was committed at some time prior to the finding of the indictment." (See *People v. Jackson*, 111 N. Y. 362, 369.) This indictment complies with these statutory requirements so far as the allegation of time is concerned, and cannot be deemed insufficient in that respect. Indeed, I think that the allegation near the beginning of the charging portion, alleging the acts of the defendant to have been done on or about the twenty-seventh day of November in the year of our Lord one thousand nine hundred and two, may well be regarded as qualifying all that follows, so that the allegation that subsequently Klein came in contact with the lowered arc light or wires and was killed is tantamount to an averment that his death was caused subsequently on the same day.

If these views are correct, it follows that the judgment appealed from should be reversed and the demurrer disallowed.

All concurred.

Judgment of the County Court of Richmond county reversed and demurrer overruled.

JULIUS LEVY, Respondent, *v.* ABRAHAM B. ROOSSIN, Appellant.

New York Municipal Court — a demand for a jury trial by the defendant after his default has been opened, held to be sufficient.

In an action brought by an attorney and counselor at law in the Municipal Court of the city of New York to recover the value of professional services rendered by him to the defendant, the latter suffered judgment to be taken against him by default. Thereafter the default was opened upon the condition, among others, that an answer should be filed on or before November 6, 1903. When this direction was made, the counsel for the defendant asked for a jury trial and offered to pay the clerk for a venire. The application was denied by the court.

The defendant filed his answer on November 6, 1903, and renewed his motion for a jury trial and his tender, but the application was again denied.

Held, that under section 281 of the New York Municipal Court Act (Laws of 1902, chap. 580), which provides, "At any time when an issue of fact is joined, either party may demand a trial by jury, and unless so demanded at the joining of issue, a jury trial is waived," the defendant's application for a jury trial should have been granted;

That the provision of section 145 of the Municipal Court Act, that issue in certain cases must be joined on the return day of the summons, except as otherwise specially prescribed in the statute, did not necessitate a holding that issue was joined in the case at bar when the defendant's default was taken;

That the opening of the default left the parties to the action in exactly the same position which they occupied before the return day of the summons, except in so far as the order opening the default imposed conditions upon the defendant.

APPEAL by the defendant, Abraham Roossin, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, entered on the 13th day of November, 1903, and also from two orders entered on the 2d and 6th days of November, 1903, respectively, opening the defendants' default and denying a jury trial.

Alexander B. Greenberg, for the appellant.

Julius Levy, for the respondent.

WILLARD BARTLETT, J.:

This judgment must be reversed on account of the error of the Municipal Court in refusing the defendant a trial by jury when seasonably demanded by him.

The action was brought to recover the value of professional services alleged to have been rendered to the defendant by the plaintiff as an attorney and counselor at law. The defendant suffered a default on October 30, 1903. On the second day of November following a motion was made in the Municipal Court to open this default on the ground that his counsel had mistaken the tribunal in which he was summoned to appear, and had proceeded to the Municipal Court in the fourth district of the borough of Manhattan, instead of to the Municipal Court in the fourth district of the borough of Brooklyn. The default was opened upon the condition that the defendant should deposit in court \$135 to secure any judgment that might be recovered, and that an answer be filed on or before November 6, 1903. When this direction was made, counsel for defendant asked for a jury, and offered to pay to the clerk the sum of four dollars and a half for a venire. The court denied the application for a jury trial, and counsel for the defendant excepted. On the adjourned day (November 6, 1903) the parties duly appeared before the Municipal Court, and counsel for the defendant filed an answer, and renewed his motion for a trial by jury, and also renewed his tender of four dollars and a half for the jury fee. The court denied the application, and counsel duly excepted.

Section 231 of the New York Municipal Court Act (*Laws of 1902, chap. 580*) provides as follows: "At any time when an issue of fact is joined, either party may demand a trial by jury, and unless so demanded at the joining of issue, a jury trial is waived. The party demanding a trial by jury shall forthwith pay to the clerk the sum of four dollars and fifty cents. In default of which payment the court shall proceed as if no demand for trial by jury had been made." The defendant had complied with all the requirements of the section cited in order to entitle him to a trial by jury. He had offered to pay the prescribed fee and tendered the same, which was all that he could do in view of the refusal of the court to allow the clerk to receive it. Issue had not been joined in the action until the filing of the answer, which was filed at the precise time directed by the court when the default was opened. In behalf of the respondent it is argued that because in section 145 of the Municipal Court Act it is provided that issue in certain cases must be joined on the return day of the summons, except as otherwise expressly pre-

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scribed in the statute, it should be held that issue was joined in this case when the defendant's default was taken on account of his mistake in regard to the borough in which the venue was laid, and hence that the defendant lost his right to apply for a jury trial because he did not appear in the right place on that day. This is a forced construction, which ought not to be adopted if it can be avoided. The opening of the default left the parties to the action in exactly the same position which they occupied before the return day of the summons, except so far as the order opening the default imposed conditions upon the defendant. Those conditions did not include the requirement that he should relinquish his right to a trial by jury. Issue was not actually joined until the filing of the answer, and at that time defendant could not properly be deprived of the right of a jury trial, conferred upon him by section 231 of the Municipal Court Act.

The provisions of that section do not differ substantially from those of section 2990 of the Code of Civil Procedure in regard to jury trials in courts of justices of the peace. The language of that section is: "At the time when an issue of fact is joined either party may demand a trial by jury, and unless so demanded at the joining of issue a jury trial is waived." It has been held by the Appellate Division in the fourth department that there is nothing in the language last quoted that limits the right to demand a trial by jury to the joining of issue upon the return day of the summons, although the demand would usually be limited to the issue joined on such return day, if the defendant then pleaded. (*Reese v. Baum*, 83 App. Div. 550.) The defendant in the case at bar, however, did not plead on the first return day; he was relieved from the consequences of his default; and the order opening that default postponed the joinder of issue until the day when his answer was actually filed. By the action of the court below he has been deprived of a substantial right, which requires a reversal of the judgment.

All concurred.

Judgment of the Municipal Court reversed and new trial ordered,
costs to abide the event.

GEOEGE S. HOLMES, Respondent, v. ARTHUR H. ELY, Appellant.

Satisfaction of a mortgage, under an agreement by the debtor to pay the debt — action by an assignee of the original creditor to recover an unpaid balance — when it is based on the promise and not on the bond — if on the bond the obligee is a necessary party — facts impliedly averred considered on a demurrer — they may be traversed.

The complaint in an action alleged that the defendant executed and delivered to Samuel I. Acken his bond conditioned for the payment of the sum of \$20,000 with interest; that he executed, as collateral security for the payment of said bond, a mortgage upon certain premises; that thereafter Acken, upon the request of the defendant and upon the defendant's express promise to pay the said sum of \$20,000, satisfied the mortgage; that subsequently the defendant, in pursuance of his promise to pay the \$20,000, paid to Acken \$9,000, leaving a balance still due and owing to Acken of \$11,000 with interest from the 1st day of March, 1901; that no part of this sum had been paid, although frequently demanded; that the said Samuel I. Acken had assigned all his right, title and interest in said sum of \$11,000 with interest to the firm of Samuel I. Acken & Sons, and that said firm had subsequently transferred the claim to the plaintiff.

Held, that the complaint impliedly averred that Samuel I. Acken, upon the express promise of the defendant to pay the indebtedness, relinquished his mortgage security and relied upon the new promise in place of the bond which had been given;

That the action was not upon the original bond, but was upon such new promise, and that the complaint stated facts sufficient to constitute a cause of action.

Semble, that if the action had been brought upon the original bond it would have been necessary, such bond not having been assigned, to make Acken a party defendant.

Upon the hearing of a demurrer the pleading demurred to will be held to state all facts that can be implied from the allegations by reasonable and fair intendment; facts so impliedly averred are traversable in the same manner as though directly stated.

APPEAL by the defendant, Arthur H. Ely, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 5th day of August, 1903, upon the decision of the court, rendered after a trial at the Westchester Special Term, overruling the defendant's demurrer to the plaintiff's complaint.

Justus A. B. Cowles [Charles P. Cowles with him on the brief], for the appellant.

Frederick Hulse, for the respondent.

WOODWARD, J.:

The plaintiff brings this action as the assignee of a claim owned and held by the firm of Samuel I. Acken & Sons against the defendant, and the latter demurs to the complaint upon the grounds (1) "That it appears upon the face of the plaintiff's complaint herein that there is a defect of parties defendant in that Samuel I. Acken is not made a party defendant herein," and (2) "That it appears upon the face of the plaintiff's complaint herein that the complaint does not state facts sufficient to constitute a cause of action." This demurrer has been overruled at the Special Term, and the defendant appeals from the interlocutory judgment entered.

We are convinced from an examination of the complaint that it is not open to the objections urged, and that it does state facts sufficient to constitute a cause of action. The theory of the demurring defendant is that the action was brought upon a certain bond, mention of which is made in the 1st paragraph of the complaint, and that the person to whom this bond was made and delivered, it not having been assigned, should have been made a party defendant. We think this theory is not justified by the facts set forth in the complaint. The complaint alleges, on information and belief, that the defendant, for the purpose of securing the payment to one Samuel I. Acken of the sum of \$20,000 with interest thereon, on or about the 23d day of December, 1898, executed and delivered to the said Acken a bond bearing date on that day, sealed with his seal, whereby he bound himself, his heirs, executors and administrators, in the penalty of \$40,000, and upon the condition that the same should be void if the said defendant should pay to the said Samuel I. Acken, his executors, administrators or assigns, the sum of money first above mentioned; that the defendant on the same day, and as collateral security, duly executed, acknowledged and delivered a mortgage upon certain premises; that thereafter the defendant requested the said Samuel I. Acken to cancel the lien of said mortgage and satisfy the same, and that the said Samuel I. Acken upon the request of the defendant and upon the defendant's express promise to pay the said sum of \$20,000, agreed to cancel the said mortgage and that he did execute and deliver a satisfaction piece to the said defendant; that subsequently, and about the month of May, 1900, the defendant, in pursuance of his promise to pay the

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\$20,000 above mentioned, did pay to the said Samuel I. Acken the sum of \$7,000, and that subsequently the defendant paid various sums aggregating \$2,000, leaving a balance still due and owing to the said Samuel I. Acken of \$11,000, with interest from the 1st day of March, 1901, no part of which has been paid, though frequently demanded. The complaint then sets forth an assignment of all the right, title and interest of the said Samuel I. Acken in and to the said sum of \$11,000, with interest as aforesaid, to Samuel I. Acken, Joseph Acken and Samuel I. Acken, Jr., composing the firm of Samuel I. Acken & Sons, and a subsequent transfer of the said claim by the above firm to the plaintiff.

If the plaintiff had alleged that on a given day the defendant owed Samuel I. Acken the sum of \$20,000, and that the defendant had promised to pay the same, that he had paid from time to time sums aggregating \$9,000, and that there was still due and unpaid \$11,000, though often demanded, and that this claim had been duly assigned to the plaintiff, there would be no doubt that a good cause of action was stated, and we fail to discover any fatal defect in the complaint because the pleader has set forth the facts out of which this claim arose. The action is not upon the original bond, but upon the express promise of the defendant to pay the amount, in consideration of the discharge of the mortgage which was given as collateral to such bond, and the complaint will be deemed to be sufficient whenever the requisite allegations can be fairly gathered from all the averments, though the statement of them may be argumentative and the pleading deficient in logical order and in technical language. The pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated. (*Sage v. Culver*, 147 N. Y. 241, 245, and authorities there cited.) We think the allegations of this complaint impliedly aver that Samuel I. Acken, upon the express promise of the defendant to pay this indebtedness, relinquished his mortgage security and relied upon the new promise in place of the bond which had been given, and that both parties treated the matter in this light, the defendant paying from time to time upon this new promise until he had discharged \$9,000 of the indebtedness. Mr. Acken could have sued upon this promise independent of the bond, and

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the plaintiff, having title through Mr. Acken to the claim asserted in this action, has a right to recover the amount due, and there is no reason to anticipate that any one else will be able to recover upon the bond.

The interlocutory judgment should be affirmed, with costs, and the defendant should be permitted to answer upon the payment of costs.

All concurred.

Interlocutory judgment affirmed, with costs.

**JOSEPH CLARKE, as Administrator, etc., of ANNE CLARKE, Deceased,
Respondent, v. ELIZABETH B. WELSH, Appellant.**

Negligence — injury to a tenant who while leaning upon a rotten railing of a balcony in the rear of a tenement house, falls into the yard.

A four-story building contained stores on the ground floor and apartments upon each of the upper floors. At the rear of the building were four balconies on a level with the several floors. The balconies were connected by stairways which were used by the tenants of the several apartments in reaching a common cellar and yard. On one occasion, a woman, who resided with her family upon the second story of the building, came down the common stairway to the balcony in the rear of the store on the first floor of the building and leaned over the railing for the purpose of calling to her children who were in the yard below. While in this attitude, the railing fell, precipitating the woman to the ground and causing her to sustain injuries which resulted in her death.

In an action brought against the owner of the building to recover damages resulting from the death of the woman, evidence was given to the effect that the woman weighed about 110 pounds; that the railing was rotted to a degree which could hardly have escaped attention if any reasonable effort had been made to determine its safety, and that its rotten condition had been concealed by the use of paint.

Held, that a judgment entered upon a verdict in favor of the plaintiff should be affirmed;

That the evidence warranted a finding that the defendant owed the intestate the duty of exercising reasonable care to make the balcony railing in the rear of the store reasonably safe, and that the defendant had been negligent in that respect;

That the intestate had a right to assume that the balcony railing was safe and that the question whether she was guilty of contributory negligence, in leaning upon the railing without making an examination of its condition, was one of fact for the jury.

APPEAL by the defendant, Elizabeth B. Welsh, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 23d day of April, 1903, upon the verdict of a jury for \$4,000, and also from an order entered in said clerk's office on the 30th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

James M. Hunt, for the appellant.

Michael J. Tierney, for the respondent.

WOODWARD, J.:

The defendant in this action, who appeals from the judgment, is the owner of a four-story tenement building in the city of Yonkers. The building has three stores on the ground floor, and above these stores are apartments. At the rear there are four balconies running entirely across the building and on a level with the several floors. From each of these balconies there is a single stairway leading to the balcony above, and these stairways were used by the tenants of the several apartments in reaching a common cellar and yard. The plaintiff's theory, and the one which must have been accepted by the jury, was that these several balconies, which were not partitioned, and the single stairway leading to them, and thence to the yard and basement, were retained in the custody and control of the defendant for the common use of all of the tenants, and that the defendant, therefore, owed the plaintiff's intestate, who was one of such tenants, the duty of ordinary care in the construction, care and maintenance of such balconies. The defendant, on the other hand, insists that only the balconies in the immediate rear of the several apartments, or at least in the case of the store in the rear of which the accident occurred, belonged to the tenant, and that as the plaintiff's intestate was injured through the falling of the railing in the rear of one Friedman's store, the defendant owed her no duty.

We think the facts and circumstances, in connection with the evidence of plaintiff's witnesses, are sufficient to support the view taken by the jury, and that the defendant did owe the plaintiff's intestate the duty of exercising ordinary care in making the balcony in the rear of Friedman's store reasonably safe for the purpose for which it was intended. Certainly if there was need of the railing

in the first instance, the defendant owed it to the common tenants of the building to see that it was maintained in a reasonably safe condition, or at least to exercise a reasonable degree of care to this end.

The evidence shows that on the 2d day of January, 1903, at about ten-thirty a. m., Mrs. Clarke, plaintiff's intestate, who lived with her husband and children upon the second floor of this building, immediately over the store of Mr. Friedman, came down the common stairway to the balcony in the rear of the Friedman store, that she passed along this balcony to near the end of the building where she leaned over the railing, with her hand upon the same, for the purpose of calling to her children who were in the yard below and who were quarreling at the time. While in this attitude the railing fell, the woman was precipitated to the ground, seven feet below, receiving injuries which resulted in her death soon afterward. While there was some conflict of evidence there was enough before the jury for them to find that the railing was rotted to a degree which could hardly have escaped detection if any reasonable effort had been made to determine the safety of this balcony railing. One witness testified that it was so decayed at the point where it joined the upright post that it crumbled in his fingers when he took hold of the wood, and there was no dispute that it was in such a condition that it would not hold nails, and that the nails which had been used were rusted and rotten. There was evidence that this condition had been covered up by the use of paint, and the danger, if it may be presumed to have been known to the intestate, was not of that obvious character which would demand a finding of contributory negligence, although it might warrant the jury in finding that it was such a defect as would be discovered by reasonable inspection on the part of one owing the duty of reasonable care in maintaining such a railing. The railing being there for the obvious purpose of protecting those who were lawfully using the balconies, plaintiff's intestate had a right to assume that they were reasonably adapted to that purpose, and whether she was in the exercise of a reasonable degree of care in leaning over this railing without taking the pains to make an examination, was clearly a question for the jury. The danger is not shown to have been known to her; it is insisted on the part of the defendant that it was not obvious, and it

was, therefore, for the jury to say whether the leaning upon the railing for the purpose of looking into the yard or under the veranda, was within the scope of that reasonable care which the plaintiff's intestate owed to the defendant in the use of this balcony as a condition of the plaintiff's recovery. In other words, the defendant was maintaining a railing around this balcony, and the question presented to the jury was whether the plaintiff's intestate, in approaching the railing and leaning upon it as she did (she being a woman of about 110 pounds weight), exercised that degree of care which the obvious circumstances demanded, whether she had a right to rely upon the safety of the structure to the extent that she obviously did in leaning out over it? The jury has found that she was exercising that reasonable degree of care, and in the light of common experience, as to what men and women do under similar circumstances, and what they might fairly be expected to do, we see no reason for holding that the jury is not justified in its verdict.

The judgment and order appealed from should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

FRANK W. SUYDAM, Respondent, v. JAMES B. HEALY, Appellant.

Real estate broker — when he earns his commissions on an exchange of real estate — subsequent refusal of his principal to complete it.

A broker employed to effect an exchange of real estate earns his commissions when he finds a person ready, able and willing to perform his part of the agreement upon the terms named by the broker's employer.

The fact that the employer subsequently refuses to enter into a contract of exchange does not affect the broker's right to his commissions.

APPEAL by the defendant, James B. Healy, from a judgment of the County Court of Kings county in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 22d day of June, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 16th day of July, 1903, denying the defendant's motion for a new trial made upon the minutes.

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M. F. McGoldrick, for the appellant.*W. P. Douglass*, for the respondent.**PRIOR CURIAM:**

The plaintiff was a real estate broker, and was concededly employed by the defendant to exchange certain property on Fulton street, borough of Brooklyn, for other property in the same borough. There is no dispute that the plaintiff procured a person ready, willing and able to enter into an agreement for the exchange of property upon the terms dictated by the defendant, and the only conflict of evidence of any importance was upon the question of whether the defendant was willing to close the contract after the work had been done. If it were material, the evidence is sufficient to support the finding of the jury, but as we look at the case the plaintiff had earned his right to a commission when he had found a person who was ready, willing and able to perform his part of the agreement upon the terms named by the defendant. If there is any conflict of evidence in this respect it is a mere quibble as to whether the defendant had agreed to all of the details, both properties being subject to mortgages, which the case appears to assume were to be taken care of by the purchasing party in each case. The evidence is, however, that the Fulton street property was to be exchanged at an agreed valuation of \$50,000; that this property was mortgaged for \$30,000, and that the property offered in exchange consisted of thirty lots, valued at \$500 to \$1,100 each, to which was to be added \$5,000 in cash. These thirty lots were subject to a mortgage of \$7,000, so that it appears that the defendant was getting about the amount agreed upon as the value of his Fulton street property. The evidence, if disputed, is sufficient to warrant the jury in finding that he agreed to this exchange after looking over the thirty lots, and the fact that he afterward refused to enter into a contract of exchange does not affect the plaintiff's right to his commission. (*Charles v. Cook*, 88 App. Div. 81-83, and authorities there cited.)

The judgment and order appealed from should be affirmed, with costs.

All concurred.

Judgment and order of the County Court of Kings county affirmed, with costs.

GEORGE H. WEBSTER, Plaintiff, *v.* THE TOWN OF WHITE PLAINS,
Defendant.

Town bonding — the petition to the supervisors must be in the form required by the statute in existence at the time it is to be acted upon by the supervisors — chapter 469 of the Laws of 1908 is not retrospective.

October 6, 1902, the town board of a town and the commissioner of highways thereof presented a petition to the board of supervisors of the county pursuant to the provisions of section 69 of the County Law (Laws of 1892, chap. 686, as amd. by Laws of 1900, chap. 12), for leave to issue bonds for highway purposes.

The petition was granted by a resolution of the board of supervisors passed June 1, 1903, and the bonds were subsequently issued and sold.

May 7, 1903, chapter 469 of the Laws of 1903, which amended section 69 of the County Law by providing that the petition to issue bonds for highway purposes should have the sanction of the vote of a majority of the electors of the town, and that it should contain a written estimate of the expense of the highway improvement, went into effect.

The petition acted upon by the board of supervisors did not comply with these requirements of the act of 1903.

Held, that the bonds were invalid;

That it could not be successfully urged that, as the town had taken action under the law as it existed prior to May 7, 1903, the jurisdiction of the board of supervisors was not affected by the amendment of the statute, under the provisions of section 31 of the Statutory Construction Law (Laws of 1892, chap. 677), which provides that the "repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect;"

That the act of 1903 was not retrospective, either as to the board of supervisors or the town.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

Daniel F. Cohalan, for the plaintiff.

John M. Digney, for the defendant.

WOODWARD, J.:

On the 6th day of October, 1902, W. S. Sterling, supervisor, James J. Shaw, town clerk, G. Truman Capron, Ffarrington M. Thompson, E. C. Dunning, Jr., and Douglas Murray, justices of the

peace, and Marvin Horton, commissioner of highways of the town of White Plains, presented a petition to the board of supervisors of Westchester county, under the provisions of chapter 686 of the Laws of 1892, as amended, requesting, advising and consenting to the adoption of a resolution by said board, authorizing the issuing of \$60,000 of bonds of said township for the purposes authorized by section 69 of said act as amended. At the regular monthly session of the board of supervisors of Westchester county, held June 1, 1903, the judiciary committee, to whom this petition was referred, reported in favor of the passage of the resolution, and it was adopted by the board of supervisors. In pursuance of the supposed authority of such resolution the bonds of the town were subsequently issued and sold to the amount of \$60,000, and the question presented upon this submission is whether these bonds have been duly authorized, the plaintiff being a taxpayer who challenges the legality of the action of the town in issuing such bonds.

There is no doubt of the validity of the bonds under the provisions of section 69 of chapter 686 of the Laws of 1892, as amended by chapter 79 of the Laws of 1894, chapter 163 of the Laws of 1894, chapter 742 of the Laws of 1895, chapter 178 of the Laws of 1896, and chapter 12 of the Laws of 1900. The real point in issue is presented by the provisions of chapter 469 of the Laws of 1903, which went into effect on the 7th day of May, 1903, nearly one month before the adoption of the resolution authorizing the issuing of the bonds by the board of supervisors. Under the act, as it stood prior to this last enactment, it was only necessary that the petition should be authorized by a vote of the taxpayers "or upon the written request of the commissioners of highways and town board of such town," and the petition in question was made upon such written request by the town officers. Section 1 of chapter 469 of the Laws of 1903 amends section 69 of chapter 686 of the Laws of 1892 so as to read as follows: "The board may upon the application of any town, liable or to be made liable to taxation, in whole or in part, for constructing, building, repairing or discontinuing any highway or bridge therein, or upon its borders, pursuant to a vote of a majority of the electors of such town at an annual town meeting or special town meeting, called for that purpose, taken pursuant to sections

thirty, thirty-one and thirty-two of the town law, or upon the written request of the commissioners of highways and town board of such town or towns, and said vote of a majority of said electors, in a case arising under section ten of the highway law, where the highway or bridge has not been already repaired or rebuilt, authorize such town or towns to construct, build, repair or discontinue such highway or bridge, and to authorize said town or towns to borrow such sums of money therefor, for and on the credit of such town or towns as may be necessary according to a written estimate in items of the fair cost and expense thereof."

It is conceded by the defendant that the petition before the board of supervisors on the 1st day of June, 1903, did not have the sanction of the electors of the township, and that it did not contain the estimate of the fair cost and expense, but it is urged that as the town had taken action under the law as it existed prior to May 7, 1903, the jurisdiction of the board of supervisors was not affected by this amendment of the statute, under the provisions of section 31 of the Statutory Construction Law (Laws of 1892, chap. 677), which provides that the "repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect," etc. A very similar contention was made before this court in the case of *Palmer v. Hickory Grove Cemetery* (84 App. Div. 600), and we held that the Statutory Construction Law did not operate to preserve the jurisdiction of the board of supervisors to grant privileges to a cemetery corporation where the law had declared that under certain circumstances, which were shown to exist, the board should not have such power, although the preliminary steps, necessary to such grants, had been taken before the change in the law. Chapter 469 of the Laws of 1903, as well as the act which it amends, provides for giving a power to the board of supervisors to grant concessions to towns; the town has no vested right in any particular mode of procedure, and when by the act of 1903 it became necessary for the town to do further acts in order to invest the board of supervisors with jurisdiction, the power of the board of supervisors to act upon a petition which complied with the provisions of a former statute came to an end. In other words, when the board of supervisors attempted to act the law did not per-

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mit of such action upon the petition which was before it; there was an absence of facts giving it jurisdiction, and its adoption of a resolution authorizing the issuing of \$60,000 of the bonds of the town was without force or effect. So far as this amendment related to the board of supervisors, it simply required a different state of facts from that which had been previously required as a condition of acting at all. The statute prescribed the duty of the board in a certain contingency, and before the performance of that duty was reached, and before the board had performed any duty in the matter, the Legislature repealed the law under which the defendant had acted, and provided a new rule. As to the board of supervisors the legislation was prospective, not retrospective. Nor was it retrospective as to the defendant if by the general rule of law the procedure in an action is governed by the law regulating it at the time, any question of procedure arises. (*Lazarus v. M. E. R. Co.*, 145 N. Y. 581, 585.) In the case last cited it was urged by the defendants that under the provisions of section 31 of the Statutory Construction Law they were entitled to findings by the referee under the provisions of section 1023 of the Code of Civil Procedure, which had been repealed during the litigation. The court say: "The only right which accrued to the defendants upon the submission of the proposed findings was the right to demand from the referee an observance of the provisions of section 1023. But it was a conditional right only, and the abrogation of the duty to pass upon the findings consequent upon a repeal of the section was not in any proper sense an impairment of any act theretofore done by the defendants or any right accrued to them. The change left unimpaired all defenses to the action. The repeal of the section acted directly and immediately upon the duty of the court or referee, and only incidentally upon the particular case in question. The defendants could no longer require the performance of the duty in their behalf, because the Legislature had changed the procedure and abrogated the duty. The taking of a step under section 1023, which, if the section had remained in force, would have entitled them to demand the performance by the referee of the duty imposed thereby, was not an act done which conferred a right, protected by section 37 * of the Statute.

* *Sic.* See § 31.—[REP.]

tory Construction Act from the ordinary operation of the Repealing Act."

In the case at bar the Legislature repealed section 69 of the original act and substituted a new section, covering the same subject, and if the defendant had attempted to compel the board of supervisors to act at any time subsequent to May 7, 1903, there can be no doubt that the board of supervisors would have shown a complete justification for non-action by pointing out that the petition before them did not establish the facts necessary to give jurisdiction. That which would have been a defense to the board of supervisors is a fatal defect in the proceeding necessary to impose a burden upon the taxpayers of the town of White Plains. The power of the board of supervisors, upon the petition of the town officers, to impose a burden of debt was taken away by chapter 469 of the Laws of 1903, and the town could receive no authority from the resolution. As was said in a somewhat similar case, where a constitutional amendment operated to repeal the power: "If when the constitutional amendment took effect the vote had been duly taken and the requisite vote of the majority of the taxable inhabitants to the raising of the money had been secured, the constitutional amendment prevented further action, and rendered the prior proceedings null and void. The authority to create the debt was taken away, and no power existed to borrow money or to issue the bonds of the village, for the purposes of the act of 1867."* (*People ex rel. Hotfield v. Trustees*, 70 N. Y. 28, 33; *Pearsall v. Great Northern Railway*, 161 U. S. 646, 666, and authorities there cited, where the rule laid down is much more favorable to the plaintiff than the one necessarily involved in this decision.)

The plaintiff should have judgment, the proceedings being without jurisdiction on the part of the board of supervisors.

All concurred.

Judgment for plaintiff on agreed statement of facts.

* See chap. 953.—[REP.]

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**FREDERICK J. GILLESPIE, Respondent, v. GEORGE L. MONTGOMERY
and HENRY BISCHOFF, Appellants.**

Complaint to recover one-half the profits of a business under an agreement for the use of plaintiff's services and name—not demurrable because it asks for an accounting and receiver—the demand for equitable relief regarded as surplusage—its failure to allege the use of plaintiff's name.

The complaint in an action alleged that the defendants were copartners; that, in consideration of the plaintiff giving his services and allowing his name to be used for the purpose of raising the sum of \$21,600 for use in the business, the defendants promised and agreed to give him an equal share in the profits thereof; that the plaintiff superintended the defendants' business and acted for them from August 15, 1902, until February 21, 1903; that the plaintiff's share of the copartnership profits for such period was \$5,000 or more which was unpaid; that the defendants had failed or refused to account for such share of the profits, and that an accounting was necessary to determine the true amount due and payable to the plaintiff.

The plaintiff asked for an accounting and for the appointment of a receiver; also "that said defendants may be compelled to pay said plaintiff the said sum of five thousand (\$5,000) dollars, or such sum as may be due him as his share of the profits aforesaid, and that plaintiff have such other and further relief as may be just and equitable."

Held, that the complaint was not demurrable on the ground that it did not state facts sufficient to constitute a cause of action;

That the facts stated entitled the plaintiff to some form of legal relief and that the averments seeking equitable relief might be regarded as surplusage;

That while there was force in the criticism that the plaintiff had not sufficiently alleged that he allowed his name to be used in raising the sum of \$21,600, such criticism, even if sound, was not sufficient to support the demurrer, as it could not be assumed that the contract was entire in the sense that failure to permit the use of the plaintiff's name defeated his right to any share in the profits, although he performed services for the defendants.

APPEAL by the defendants, George L. Montgomery and another, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 25th day of June, 1903, upon the decision of the court, rendered after a trial at the Kings County Special Term, overruling the defendants' demurrer to the plaintiff's complaint.

Edward H. M. Roehr, for the appellants.

William Hughes, for the respondent.

JENKS, J.:

The defendants demur that the complaint does not state facts sufficient to constitute a cause of action. The position of the learned counsel for the appellants is that the plaintiff seeks equitable relief to which he is not entitled, and that a complaint in an action at law is made to the equitable side of the court.

Leggett v. Stevens (77 App. Div. 612) holds that if the complaint state a cause of action of which some court has cognizance, a demurrer that the complaint does not state facts sufficient to constitute a cause of action, does not technically raise the question whether the equity branch has jurisdiction, but that it can only be raised under the second ground specified in section 488 of the Code of Civil Procedure.

In *Hotel Register Co. v. Osborne* (84 App. Div. 307) the court states the general rule that if the facts show that the plaintiff is entitled either to equitable or to legal relief, the complaint is not demurrable upon the ground stated in the demurrer, citing *Middleton v. Ames* (37 App. Div. 510) and *Lester v. Seilliere* (50 id. 239). *Abbey v. Wheeler* (170 N. Y. 122, 127) holds that if the facts alleged in the complaint justify legal or equitable recovery, a demurrer upon the ground stated in this case is not well interposed, although the pleading may be open to correction by motion or otherwise.

We must first ascertain whether the facts alleged, if taken as facts, state any cause of action. (*Sage v. Culver*, 147 N. Y. 241.) The plaintiff complains that the defendants were copartners in business as brokers and money lenders, who agreed to pay to the plaintiff for services to the copartnership an equal share of their profits. The plaintiff superintended their business and acted for them from August 15, 1902, until February 21, 1903. Plaintiff's share of such copartnership profits for such period is \$5,000 or more, which is unpaid. The defendants have failed or refused to account therefor. I think that the facts stated establish plaintiff's right to some form of legal relief.

But the point of the learned counsel for the appellants is that the plaintiff also pleads that an accounting is necessary to determine the true amount due and payable, and that he prays judgment for the accounting and for a receiver. But the plaintiff also prays "that

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said defendants may be compelled to pay said plaintiff the said sum of five thousand (\$5,000) dollars or such sum as may be due him as his share of the profits aforesaid, and that plaintiff have such other and further relief as may be just and equitable." The authorities cited by the learned counsel for the appellants may be discriminated. *Black v. Vanderbilt* (70 App. Div. 16) is principally relied upon. In that case the court states that no legal redress was demanded, and that it consequently appears that the complaint was framed for equitable relief alone. This statement is borne out by the prayer of the pleader in that case. The court cites *Swart v. Boughton* (35 Hun, 287), and quotes therefrom: "Where all of the allegations of the complaint are made for the purpose of procuring equitable relief, and where equitable relief alone is asked for, the complaint cannot be sustained for legal redress where no answer has been interposed." The court also cites *Cody v. First Nat. Bank* (63 App. Div. 199). This case presents the converse of *Swart's Case (supra)*, for the sole demand was for the specific relief of money damages, and the complaint was framed directly for such prayer. And so the decision is based upon the ground that only legal redress was demanded. The appellants also cite *Kelly v. Downing* (42 N. Y. 71). In that case the court, construing section 275 of the Code of Procedure, say: "It was not the object of this section to aid a plaintiff who had insufficiently stated the cause of action upon which he seeks judgment, but simply to aid him if his complaint is adequate for the judgment he asks, except his prayer for relief. In this case the complaint states but one cause of action, and that one in equity. * * * There was nothing in the whole framework of the complaint, nor in the prayer for relief that would lead Bailey to infer that a judgment would or could be taken against him upon the note." So far as *O'Brien v. Fitzgerald* (143 N. Y. 377) is pertinent, it but holds that where the facts pleaded are ambiguous, so as to support legal action or equitable, the relief asked is the necessary because the sole solution of the ambiguity. In *Bateman v. Straus* (86 App. Div. 540) the question before this court was whether upon the facts pleaded an action for specific performance of a contract of chattel property would lie, and we held that inasmuch as the plaintiff did

not plead directly or by inference that he had no adequate remedy at law the action would not lie.

The averments that seek equitable relief may be regarded as surplusage. (*Hackett v. Equitable Life Assurance Soc.*, 50 App. Div. 266, 272.) Without them there is good cause of action at law sufficiently well stated to prevail against this demurrer, and there is a specific demand in the prayer for relief for money, namely, \$5,000. If, in addition thereto, the plaintiff prays for other specific or general relief, to which he is not entitled, he is not, therefore, to be dismissed by the court. (*Wetmore v. Porter*, 92 N. Y. 76; *Hotel Register Co. v. Osborne, supra*; *Mitchell v. Thorne*, 134 N. Y. 536.)

The learned counsel for the appellants also insists that the pleading is bad in that the plaintiff has not pleaded performance of the condition precedent. The pleader states that in consideration of the plaintiff giving his services and allowing his name to be used in raising the sum of \$21,600 for the purpose of said business, the said defendants promised and agreed to give to him an equal share in the profits thereof while he continued to act and perform services on behalf of said copartnership business, and that the said plaintiff continued to superintend the said business and act on behalf of the said partners therein from the said 15th day of August, 1902, until the 21st day of February, 1903. The criticism is that the pleader has not sufficiently alleged that the plaintiff did allow his name to be used in raising the sum of \$21,600. I think that there is force in the criticism, but even if it be sound, it is not enough to support the demurrer. It cannot be assumed that the contract was entire in the sense that failure to permit the use of the plaintiff's name defeated his right to any share in the profits, although he performed services and acted for the defendants. The question is whether, upon the facts stated, the plaintiff is entitled to any relief whatever. (*Strubbe v. Kings County Trust Co.*, 60 App. Div. 548, 550; affd., 169 N. Y. 603; *Jaques v. Morris*, 2 E. D. Smith, 639, 643; *Prix v. Brown*, 10 Abb. N. C. 67.) We cannot say that he is not.

The interlocutory judgment should be affirmed, with costs.

All concurred.

Interlocutory judgment affirmed, with costs.

**ARCHIBALD A. HUTCHINSON, Respondent, v. JOHN ALVIN YOUNG,
Appellant.**

Joiner of causes of action—a cause of action under section 31 of the Stock Corporation Law and one at common law for a false report by the treasurer of a corporation may be joined.

The complaint in an action to recover damages resulting from the purchase by the plaintiff of stock in a corporation upon the faith of a false report made and issued by the defendant, the treasurer of the corporation, alleged a cause of action under section 31 of the Stock Corporation Law, and also a cause of action at common law. The common-law cause of action was based upon the same allegations as the statutory cause of action, supplemented by further allegations of misrepresentation and allegations stating the scienter of the defendant. The amount of damages demanded in each cause of action was identical.

Held, that the common-law and the statutory cause of action were each for an injury to personal property and might properly be joined in the same complaint under subdivision 6 of section 484 of the Code of Civil Procedure;

That the two causes of action were not inconsistent.

APPEAL by the defendant, John Alvin Young, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 23d day of July, 1903, upon the decision of the court, rendered after a trial at the Kings County Special Term, overruling the defendant's demurrer to the plaintiff's complaint.

R. Floyd Clarke, for the appellant.

William M. Bennett [Victor K. McElheny, Jr., with him on the brief], for the respondent.

JENKS, J.:

The action is to recover damages resulting from the purchase of stock in a corporation upon the faith of a false report made and issued by the defendant, its treasurer. The plaintiff pleads a cause of action under section 31 of the Stock Corporation Law,* and a cause of action upon substantially the same facts, making the same allegations, supplemented by further allegations of misrepresentation, and alleging the *scienter* of the defendant. The defendant demurs that there is a misjoinder of a cause of action for a penalty

* See Laws of 1892, chap. 688.—[REP.]

under the said section with one for injury to personal property sounding in tort.

On a former appeal by the plaintiff from an order changing venue, we thought it pertinent to consider the question whether this cause of action based upon said section 31 was penal, and we decided that it was not. (*Hutchinson v. Young*, 80 App. Div. 246.) It is not necessary to restate the grounds for our judgment. The defendant admits that the second cause of action is for an injury to personal property within subdivision 6 of section 484 of the Code of Civil Procedure, but he contends that the first cause of action falls either within subdivision 1 of that section, as founded upon a contract implied by law or a *quasi* contract, or within subdivision 8 of the same section, as a claim against a trustee. I cannot accede to either proposition. The action conferred by the statute of 1892 (*supra*) in its present form is analogous to the common-law action for deceit or fraud, but in furtherance of such remedy in that it does not require proof of *scienter*. This is the view taken by the court in *Parsons v. Johnson* (28 App. Div. 1), where WARD, J., says: "The action upon this statute is one in tort partaking largely of the character of an action for damages for fraudulent representations knowingly made upon the sale of property." The cause of action does not fall within subdivision 8 of section 484 of the Code of Civil Procedure for the reason that the defendant was not the trustee of the plaintiff when he made the false report which is the basis of the complaint on that cause of action. Of course, the cause of action could not arise until the plaintiff purchased the stock, but the theory of the action is not to bring the defendant to book as an officer or a director of the corporation charged with the duty of a trustee with the care and management of the corporate property, but for his fraud in inducing the plaintiff to become the purchaser of its stock. The deceit or fraud lies in the report which necessarily must have been made before the plaintiff became a stockholder, and, therefore, before he became a *cestui que trust* of the defendant. The plaintiff does not complain as a stockholder on account of the administration of its affairs by the defendant, but for his fraud which induced the plaintiff to part with his money in the purchase of the stock.

The act complained of is fraud or deceit. Fraud whereby one

is induced to part with his money or property constitutes an injury to property within subdivision 10 of section 3343 of the Code of Civil Procedure. (*Benedict v. Guardian Trust Co.*, 58 App. Div. 302; *Campion Card & Paper Co. v. Searing*, 47 Hun, 237.) This common-law and this statutory cause of action are similar as to the grounds thereof — fraud, and afford the same relief — damages. Each, to my mind, is an injury to personal property, and, therefore, they may be joined under subdivision 6 of section 484 of the Code of Civil Procedure. The origin of the rights of action can afford no logical reason for forbidding this union. Abbott in his Trial Brief on the Pleadings (§ 711) states the rule: "It is the better opinion that upon the same principle a common-law ground of recovery may be joined with a ground of recovery upon a statute," citing *Chicago & Alton R. R. Co. v. Dillon* (123 Ill. 570); *Pearson v. Milwaukee & St. Paul R. Co.* (45 Iowa, 497); *Haynes v. Buffalo, N. Y. & P. R. R. Co.* (38 Hun, 17); *Durant v. Gardner* (10 Abb. Pr. 445). (See, too, *State ex rel. Attorney-General v. Milwaukee, L. S. & W. Ry. Co.*, 45 Wis. 579.)

I see no force in the point of inconsistency. Bliss on Code Pleading (§ 122) says that the requirement of consistency is but logical, and suggests as the test whether one cause of action, if valid, shows the other not to be bad. Abbott in his Trial Brief on the Pleadings (§ 427) lays down the rule: "It is the better opinion that the rule, that inconsistent causes of action cannot be joined, refers to inconsistency in point of fact between essential allegations, and not to incongruity in legal theory, nor to the mere sufficiency of one, if established, to render the other superfluous," citing authorities. Comparison of the causes of action reveals nothing contradictory or exclusive. The plaintiff in each complains of fraud or deceit, based upon substantially the same facts, and asks for damages which are identical. The difference is in additional allegations of misrepresentation, and in the further allegation of *scienter*, both set forth in the common-law cause of action. Proof of the second cause of action would establish the first cause of action. Proof of the first cause of action would tend to establish the second cause of action. The learned counsel cites as the case almost "parallel," *Sweet v. Ingerson* (12 How. Pr. 331). But there the counts were in *assumpsit* and for fraud and deceit. Abbott in his Trial Brief

on the Pleadings (§ 416) cites this very case on the principle of election between a contract and a tort. And, further, the court said in that case : "These causes of action cannot consist with each other. They demand a totally different line of proof, a different judgment and different process for enforcing a final recovery." These are the words italicized by the learned counsel for the appellant. The case was cited by counsel as *stare decisis* in *Seymour v. Lorillard* (51 N. Y. Super. Ct. 400). At pages 401 and 402 it was severely criticized by the learned opposing counsel in that case as being doubted, rejected and overthrown, and it was not heeded, but disregarded by the court. I cannot see the parallel.

If I am correct in the views hitherto expressed, both of the causes of action in this case are *ex delicto*; the proof of them is upon similar lines, though one extend further than the other, and the final recovery is identical. And even the final recovery may be enforced in like manner; for there may be the right of arrest and, consequently, of body execution (Code Civ. Proc. §§ 549, 1487) in actions purely statutory. (*People ex rel. Harris v. Gill*, 85 App. Div. 192.)

The interlocutory judgment should be affirmed, with costs.

All concurred.

Interlocutory judgment affirmed, with costs.

In the Matter of the Application of CLARK D. RHINEHART and JOHN GUILFOYLE for a Peremptory Writ of Mandamus, Respondents, *v.* WILLIAM C. REDFIELD, as Commissioner of Public Works for the Borough of Brooklyn, Appellant.

Power of a municipality over its streets — franchises therein — grant by the common council of Brooklyn of the right to lay pipes in the streets to supply ammonia gas for refrigerating purposes — when the grant is in aid of a private enterprise for the convenience of a limited number of people and within a limited district it is void — the performance of conditions, payment of taxes, etc., does not give it validity.

A municipal corporation holds its public streets and places in trust for the public, and the power to regulate their use is vested in the Legislature absolutely. It may delegate that power to the municipal corporation, but any act by the

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corporation, not within the strict or implied terms of its chartered powers, is invalid.

A municipal corporation, in the machinery of the State, is a mere agency. It possesses no inherent and independent authority to create rights in others, which affect the public.

Parties dealing with municipal corporations are bound to take notice of the limitations imposed upon their powers.

An act conveying franchises or special privileges is to be construed most favorably to the People, and all reasonable doubts in construction must be solved against the grantee. Words and phrases which are ambiguous, or admit of different meanings, are to receive, in such cases, that construction which is most favorable to the public.

A franchise is a special privilege, conferred by government on individuals or corporations, which does not belong to the citizens of a country generally, by common right.

The grant of a franchise presupposes a benefit to the public, and an equal right on the part of every member of such public, within the territory involved, to participate in this benefit upon the same terms and conditions.

The common council of the city of Brooklyn had no power under subdivision 3 of section 12 of title 2 of the charter of that city (Laws of 1888, chap. 588), which conferred power upon it "To regulate all matters connected with the public wharves and all business conducted thereon, and with all parks, places and streets of the city," or under section 19 of title 19, or section 22 of title 22 of such charter, to grant individuals a franchise to lay pipes in the streets of the city for the purpose of supplying ammonia gas for refrigerating purposes to the houses and buildings in said city, particularly where it appears that such franchise was granted in aid of a private enterprise and not for the convenience of the general public, but for the convenience of a limited number of people within a limited district.

The fact that the individuals to whom the franchise was granted have complied with the conditions described in said franchise, and that they have in common with other property owners discharged the obligation of paying taxes upon their possessions, or that the granting of this franchise will be beneficial to a number of people, or to the community as a whole, will not justify the court in upholding the franchise.

APPEAL by the defendant, William C. Redfield, as commissioner of public works for the borough of Brooklyn, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 16th day of December, 1903, granting the relators' application for a peremptory writ of mandamus.

James D. Bell, for the appellant.

Jesse Stearns, for the respondents.

WOODWARD, J.:

On the 13th day of April, 1891, the common council of the then city of Brooklyn adopted the following resolution :

"Resolved, that Clark D. Rhinehart and John Guilfoyle of the City of Brooklyn, their successors and assigns, are hereby authorized and empowered to open the streets, avenues, lanes, roads, highways and public places of the said city, and to lay and maintain therein pipes, tubes, conduits, conductors and the appliances therewith necessary for the conveying, using and supplying of gas generated from ammonia to the houses and buildings in the said city, for the purpose of refrigeration ; provided, however,

" That the said Rhinehart and Guilfoyle, their successors and assigns, shall accept this franchise, and shall within one year from the adoption of this resolution erect and complete a plant of proper and suitable machinery for the generation of such gas in the near vicinity of Wallabout Market at an actual outlay of at least one hundred thousand dollars ; and further provided that the work of opening the said streets, lanes, roads, highways, or public places, and that of laying and maintaining therein the necessary pipes, tubes, conductors and appliances, shall be under the supervision and inspection of the Department of City Works, and shall be subject to all reasonable rules, regulations and conditions prescribed, or to be prescribed, by the Department of City Works or by the Common Council."

Subsequently, by resolution of the common council, this resolution was extended six months to permit the grantees to perform their contract to construct a plant, and the petition in the proceeding now before us shows that the relators accepted the franchise attempted to be granted by the above resolution, and that they performed all of the conditions mentioned therein, and that they have for a number of years last past operated and maintained two plants for the production of ammonia gas for purposes of refrigeration. On the 6th of August, 1903, the relators asked permission of the commissioner of public works for the borough of Brooklyn to lay pipes, conduits, etc., in certain of the public streets of the borough of Brooklyn, which permission was refused, and this proceeding was instituted to compel the granting of this request. The learned court at Special Term has entered an order directing a peremptory writ

of mandamus to issue, and the commissioner of public works of the borough of Brooklyn appeals from this order.

The appellant does not question the facts in any way, but relies upon a denial of the power of the common council to grant the franchise attempted to be granted. It is fundamental that a municipal corporation holds its public streets and places in trust for the public, and that the power to regulate those uses is vested in the Legislature absolutely. It may delegate that power, as any other appropriate power, to the municipal corporation, but without such delegation any such act by the corporation, because of its not being within the strict or implied terms of its chartered powers, would be invalid. (*Potter v. Collis*, 156 N. Y. 16, 30.) What the common council attempted to do by its resolution of April 13, 1891, was to grant to the relators an exclusive interest in the streets, and the rule is well settled that an act conveying franchises or special privileges is to be construed most favorably to the People, and all reasonable doubts in construction must be solved against the grantee. Words and phrases which are ambiguous, or admit of different meanings, are to receive, in such cases, that construction which is most favorable to the public. (*People v. Broadway R. R. Co.*, 126 N. Y. 29, 37, and authorities there cited.) The relators recognize the necessity of showing legislative authority for the action of the common council, and our attention is called to subdivision 3 of section 12 of title 2 of chapter 583 of the Laws of 1888, in connection with other sections, as the foundation for the power attempted to be exercised. Said subdivision of the section provides: "The common council shall have power within said city to make, establish, publish and modify, amend or repeal ordinances, rules, regulations and by-laws, not inconsistent with this act, or with the constitution or laws of the United States, or of this State, for the following purposes: * * * 3. To regulate all matters connected with the public wharves and all business conducted thereon, and with all parks, places and streets of the city." (See, also, tit. 22, § 22, and tit. 19, § 19, which the relators seem to think have some bearing upon the question.)

Is this a delegation of a power to grant franchises to private individuals? If the lawmaker was present, and he was asked if he had intended to comprehend this case when the statute was enacted,

would he, as an honest and intelligent man, answer in the affirmative? (See *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417, 447; *Riggs v. Palmer*, 115 id. 506, 509.) Would he declare that it was his intention, by this general language, to delegate to the municipal corporation the power to grant perpetual franchises, not for the general convenience and safety of the people, but as a foundation for a private business? To ask these questions is to answer them, for surely there is no such certainty in the language as to compel the construction contended for by the relators, and in its absence we must hold that there was no such intention on the part of the Legislature. There is ample scope for the exercise of power under the sections of the statute cited, without going to the extent of holding that one of the highest prerogatives of sovereignty, that of granting franchises and special privileges, has been delegated. It may be conceded that under the authority given in the charter of the city of Brooklyn, cited above, the common council would have the power, by ordinance or resolution, to permit the relators to lay pipes in the streets for the purpose of conveying water to their boilers, or for any other incidental purpose of a private character; but the resolution and the order here under consideration go much farther; they attempt to invest these relators with a legal right to make use of the public streets for private gain to the same extent and with like effect as if possessing the franchise or privilege which the sovereign power alone could grant. (*Potter v. Collis, supra*, 31.) They attempt to grant a right, which, if effective, operates to invest private parties with an exclusive interest in the streets of Brooklyn (*Potter v. Collis, supra*), and to empower them to make use of this property held in trust for the public, not for the general convenience of the People, but for a limited number of people within a limited district, and with no obligation on the part of the relators, so far as appears, to furnish all of the people, even in the locality of its plant. A franchise is a special privilege conferred by government on individuals or corporations, and which does not belong to the citizens of a country generally, by common right. (*Curtis v. Leavitt*, 15 N. Y. 9, 170, and authority there cited.) The grant of a franchise presupposes a benefit to the public, and an equal right on the part of every member of such public, within the territory involved, to participate in this benefit upon the same terms and conditions, which terms and

conditions are prescribed by the statute. (*Beekman v. Third Avenue R. R. Co.*, 153 N. Y. 144, 152, and authorities there cited.)

Whatever may have been the powers of the common council to grant a license for the purpose of laying pipes in the streets, and upon this we pass no opinion, we are convinced that it never had any power to grant a franchise investing the relators with an interest in the streets and the legal right to use them as a foundation for their private business. A municipal corporation, in the machinery of the State, is a mere agency. It possesses no inherent and independent authority to create rights in others, which affect the public interests. (*Potter v. Collis, supra*, 30.) In the absence of a specific delegation of power to grant franchises to private individuals, a mere general authority over the highways cannot be construed to give the power attempted to be exercised by the common council of the city of Brooklyn in the matter now before us. "A franchise," to quote the language of the court in *Woods v. Lawrence County* (1 Black [U. S.], 386, 409), "is a privilege conferred in the United States by the immediate or antecedent legislation of an act of incorporation, with conditions expressed, or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment." Nowhere in the charter of the city of Brooklyn do we find any language which attempts to delegate the power of creating or granting franchises of the character of that which is asserted by the relators. The power to "regulate all matters connected with the public wharves and all business conducted thereon, and with all parks, places and streets of the city," is not a power to grant a special privilege to individuals, involving not alone the right to put in pipes, conduits, etc., but the right to perpetually maintain them, and to have an exclusive interest in the streets for the purpose of carrying on the private business of the relators; it is not a delegation of the power to grant to individuals a right of property in the highways held in trust for the public (*Potter v. Collis, supra*, 30; *Beekman v. Third Avenue R. R. Co., supra*), and it could give no force or effect to the resolutions of the common council granting such rights.

The fact that the relators have complied with the conditions prescribed, and that they have, in common with other property owners, discharged the obligation of paying taxes upon their possessions, or the further fact that the granting of this franchise would be bene-

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ficial to a number of people, or even to the community as a whole, cannot justify this court in an attempt to change the established law of this State. The relators, in dealing with a municipal corporation, were bound to know the limitations under which it acted (*Suburban El. Co. v. Town of Hempstead*, 38 App. Div. 355, 359, and authorities there cited), and "no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the just condition of being compelled to compensate any portion of the public which may suffer for their advantage." (*People ex rel. Third Ave. R. R. Co. v. Newton*, 112 N. Y. 396, 407, 408, citing authorities.)

The order appealed from should be reversed and the application for a peremptory writ of mandamus denied, with costs.

All concurred

Order reversed, with ten dollars costs and disbursements, and motion denied, with costs.

In the Matter of the Opening and Extending of Locust Avenue
Through the Lands of THEALL and Others, of the Village of Port
Chester, New York.

VILLAGE OF PORT CHESTER, Appellant; MARGARET S. THEALL,
Respondent.

Commission to open a village street — report which includes in the expenses thereof an item of \$900 for grading — it will be vacated, not sent back for correction — right of property owners to object.

The village of Port Chester, acting under title 5 of its charter (Laws of 1868, chap. 818), procured the appointment by the County Court of a commission to open and extend a street. The village authorities, however, included in their expenditures not only the sum necessary to secure the land and open the

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street, but \$900 for grading the same. The commissioners made a report in which they attempted to assess the total expense upon the property benefited, although the charter (Tit. 5, §§ 23, 24) required that assessments for grading should be made by commissioners appointed by the village board of trustees. *Held*, that the report and assessment of the commissioners were properly vacated; That, as the error in the proceedings went to the jurisdiction of the commissioners, it would be useless to send the report back for correction; That the property owners affected by the proceedings had a right to insist that the statutory provisions intended for their security should be observed, notwithstanding the fact that they might have suffered no harm from the failure of the village authorities to comply with them.

HOOKER, J., dissented.

APPEAL by the Village of Port Chester from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Westchester on the 10th day of November, 1903, denying the appellant's motion to confirm the report of commissioners in the above-entitled matter, and vacating and setting aside said report; also from an order entered in said clerk's office on the 15th day of December, 1903, denying a motion made by the said village of Port Chester to resettle the above-mentioned order, and also from an order entered in said clerk's office on the 15th day of December, 1903, denying the said appellant's motion to review the taxation of costs made in this proceeding by the clerk of the county of Westchester.

Jerome A. Peck [Arthur R. Wilcox with him on the brief], for the appellant.

Ralph E. Prime, for the respondent.

WOODWARD, J.:

The village of Port Chester is a municipal corporation organized under the provisions of chapter 818 of the Laws of 1868 and the several acts amendatory thereof. Title 5 of that act contains in sections 1 to 14, inclusive, provisions for laying out and opening streets, commissioners to estimate the expenses of said improvement and to assess the same and the damages and benefits caused thereby upon the property benefited being appointed by the County or Supreme Court on the application of the village authorities, while by sections 22 to 28, both inclusive, of the same title the law provides for the

"expense of regulating, grading and paving streets and avenues, or any part or section thereof," etc. Chapter 219 of the Laws of 1902 is the last statute that amends the charter of the village in respect to these matters, but none of these amendments has any particular bearing upon the question presented upon this appeal, and we may consider the matter from the standpoint of the original statute.

The village authorities, desiring to open or extend Locust avenue, instituted proceedings for that purpose, and a commission was appointed by the County Court for the purposes mentioned in the statute. But the village authorities did not stop here; they included in their expenditures not only the sum necessary to secure the land and open the street, but \$900 for grading the same. The commissioners appointed by the County Court have made a report in which they have attempted to assess upon the benefited property this total expense, although the statute requires that such assessments for grading, etc., shall be made by commissioners appointed by the board of trustees, such commissioners being called upon to take an oath "faithfully and fairly to discharge the duties which shall devolve upon" them by such appointment. (Laws of 1868, chap. 818, tit. 5, §§ 23, 24.) Upon this report being offered for confirmation the learned court at Special Term refused confirmation, and vacated and set aside the report on the objection of Margaret S. Theall, whose property was involved, on the ground that the two proceedings could not be conducted by the commissioners appointed by the County Court. The village of Port Chester appeals from the order entered, as well as from an order denying a motion to resettle the order, and from an order denying a motion for a retaxation of costs.

The appellant urges that the report and assessment of the commissioners should not have been vacated, but the report should have been sent back for correction of any error discovered by the court in the proceedings; but we are of opinion that the errors in proceedings going to the jurisdiction could not have been corrected by the commissioners, and that the only thing which remained for the court was to throw the whole report out, leaving the village free to proceed along the lines pointed out by the statute. "To found the power to act against a private right of property, there must be

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affirmative proof of a compliance with the prerequisites; it is a jurisdictional fact that may not be presumed nor inferred." (*Matter of City of Buffalo*, 78 N. Y. 362, 366.) The property owner or taxpayer has a right to insist that provisions intended for his security shall be observed, notwithstanding the fact that, in a particular case, he may have suffered no harm by reason of the neglect of the authorities to comply with them. (*Bowditch v. Boston*, 168 Mass. 239, 244; *Warren v. Street Commissioners*, 181 id. 6, 11.) In the matter now before us the village authorities have attempted to combine two proceedings in one; they have substituted their judgment for the plain provisions of law, and the whole proceeding is vitiated by this disregard of jurisdictional facts. The commissioners appointed by the County Court, assuming such appointment to have been regular, had jurisdiction only to deal with the expense and the assessment for the opening of the highway, and when they attempted, under the supposed authority of the village, to go beyond this and to include the cost of grading and improving that way, they went outside of their powers. The village trustees could not confer upon them any greater jurisdiction than that prescribed in the statute, and the effort to do so has resulted in a condition of affairs where there was nothing for the court to do except to set aside the whole proceeding. "It is a matter of grave public concern," say the court in *Village of Fort Edward v. Fish* (156 N. Y. 363, 375), "to protect municipal corporations from the unauthorized and illegal acts of their agents in wasting the funds of the taxpayers. It is only with the utmost difficulty that municipal officers and agents can be kept within the bounds of their authority now," and it is the duty of the courts to insist at all times, when such action is challenged, that the authority to act shall be plainly expressed in the statute, or necessarily implied, and that all of the provisions intended for the security of the taxpayer and property owner shall be strictly complied with. (*Schneider v. City of Rochester*, 160 N. Y. 165, 172, and authorities there cited.)

We have examined the matters called to our attention by the appellant, but discover no reason for reversing any of the various orders appealed from. These orders, other than the one above considered, rest largely in the discretion of the court at Special Term; and while this court undoubtedly has the right to review

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this discretion, this power will not be exercised by reversing, in the absence of controlling reasons affecting the interests of justice.

The orders appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred, except HOOKER, J., dissenting.

Orders affirmed, with ten dollars costs and disbursements.

JOHN H. MAHNKEN COMPANY, Respondent, v. VENNETTE F. PELLETREAU, Appellant.

Bond and mortgage — title thereto may be transferred by mere delivery.

A bond and mortgage may be transferred by a mere delivery, provided that an intention to effect the transfer accompanies such delivery.

HOOKER, J., dissented on other grounds.

APPEAL by the defendant, Vennette F. Pelletreau, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, entered on the 29th day of July, 1903.

William Van Wyck, for the appellant.

Charles D. Cleveland, for the respondent.

WOODWARD, J.:

It is rarely that the facts in a case are so carefully obscured by the record and the discussion as in the present instance; it is almost impossible to discover the theory of the action, or to determine what facts are established, but after a careful reading of all of the record and papers in evidence, the facts appear to be substantially as follows:

In May, 1901, a corporation known as the McPherson Material Company was engaged in business in the borough of Brooklyn, dealing in brick, cement and other building materials. This corporation sold to the defendant certain goods, wares and merchandise, delivering the same, at an agreed price of \$307.15. At the time of making this sale, or subsequent thereto, the McPherson Company agreed to

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accept in part payment of this sum a mortgage upon certain premises. It appears that this mortgage was given by third parties for \$500, and it was understood between the contracting parties that the McPherson Company was to have one-half of this mortgage, and that the balance of the amount was to be paid in money. On the 12th day of December, 1902, the plaintiff in this case brought an action against the defendant in the Supreme Court for this same cause of action, and for a second cause of action alleged a claim for \$67.25, making a total of \$374.40. In this Supreme Court action the complaint alleged the claim of \$307.15, and that no part of the said sum had been paid, "except the sum of two hundred and twenty-five dollars," and it is admitted that this \$225 was represented by the mortgage which the McPherson Company had agreed to accept from the defendant, the latter having agreed to discount or rebate the mortgage \$25 in the transaction. This left \$82.15 of the first claim unpaid, and \$67.25 of the second claim, or a total of \$149.40. On the 8th day of January, 1903, the defendant gave his check to the plaintiff's attorney for \$149.49 "in full for all claims to date in relation to furnishing bricks to Country House, Morris County, New Jersey," and on the same day he gave to the same attorney a check for \$5, which is admitted to have been paid as costs in the Supreme Court action, and which is likewise "in full of all claims," etc., as in the larger check. Both of these checks were presented and paid, and there seems to be no controversy that these were intended to settle the Supreme Court action. It will be noticed that the mortgage for \$250, discounted by \$25, with the sum of \$149.40 claimed to be due in the Supreme Court action, makes \$374.40, the exact amount of the total of the two claims, so that in the payments made to the plaintiff there was an allowance of \$25 on the mortgage. That is, assuming the mortgage for \$250 to have been worthless, there was a consideration in cash of \$25 on account of the portion of the claim which was to have been paid by the mortgage, and the plaintiff had a legal and equitable right to the mortgage, if it was, in fact, the owner of the claim. It appears to be admitted that this mortgage was delivered to the plaintiff; it in effect acknowledged its receipt in its Supreme Court action, but, without pleading any fraud in the present action, there is an attempt to show that the delivery of this mortgage for \$500 was not perfected by proper

assignments, and that there being a first mortgage upon the premises, and this having been under process of foreclosure at the time of the actual delivery of the formal assignment of the defendant's interest in the mortgage, which appears to have been made to a trustee, there was a failure of the consideration, and this action seeks to recover the value of the mortgage as it was credited up in the Supreme Court action. The learned court below has found for the plaintiff, and the defendant appeals.

Upon the merits we are of opinion that the evidence shows clearly that the defendant delivered to the McPherson Material Company the mortgage which the latter had agreed to accept in part payment of the claim, and that if there was any defect in the transfer it was not due to any refusal on the part of the defendant to make a complete delivery of all of his right, title and interest in such mortgage, and he cannot be held responsible for the fact that the plaintiff did not act with reference to the matter in time to protect its rights. No fraud is alleged, nor does the evidence tend to support that theory; the most that may be said is that the plaintiff and its attorney did not discover the nature of the transaction between the defendant and the McPherson Material Company until after the sale of the mortgaged premises under the first mortgage. It now seeks to go back of its pleadings in the Supreme Court action, where the entire matter was settled by the payment of \$149.40 in full discharge of all claims, and compel the defendant, who had parted with his rights under the mortgage in good faith and in discharge of his obligations to the McPherson Material Company, to pay the plaintiff the amount which appears to have been lost purely on account of the latter's own carelessness in dealing with the mortgage. There is no doubt that a bond and mortgage may be transferred by mere delivery, provided there is an intention so to transfer accompanying the delivery. (*Strause v. Josephthal*, 77 N. Y. 622.) There can be no doubt in the present instance that the defendant intended to transfer the mortgage in payment of his debt; this was the agreement conceded to have been made between him and the McPherson Material Company, and the mere fact that there were some other papers delivered at the same time, or that only a portion of the mortgage was intended to be transferred, does not alter the case in a manner to affect the present action. It is not

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suggested that the defendant retained any right in the mortgage as against the McPherson Material Company or its assignee ; and he having parted with the same in pursuance of his agreement, the plaintiff, if it succeeded to the rights of the McPherson Material Company, could have compelled any action on the part of the defendant which might have been necessary to preserve its rights in the mortgage. The fact that it failed to act until the mortgaged premises had been sold, can give the plaintiff no right to recover the amount from the defendant. He had paid all that he had agreed to pay ; he had no interest in the mortgage after its transfer to the McPherson Material Company ; he never claimed any rights in it after that time, and the fact that he discounted the mortgage twenty-five dollars which he made good in money, is evidence that the mortgage was not considered first class, and that there was a good consideration for the settlement in the Supreme Court action. After the defendant is no longer in a position to get any benefit out of this mortgage, it would be most unjust to compel him to pay this money, when he had placed the plaintiff's assignor in a position to protect his rights by delivering the mortgage before the foreclosure of the first mortgage. He had done his full duty in the premises when he had delivered the mortgage with an intent to transfer the same to the McPherson Company. If the security subsequently failed it was one of the risks which that company took in accepting the mortgage ; it was one of the risks for which the defendant had compensated the McPherson Company by a discount of twenty-five dollars in the face value of the portion of the mortgage assigned.

The judgment appealed from should be reversed and the complaint should be dismissed upon the merits, with costs.

All concurred, except HOOKER, J., who read for affirmance.

HOOKER, J. :

I dissent. The defendant, by failure to allege affirmatively that the plaintiff is not incorporated, raises no issue on this subject. (Code Civ. Proc. § 1776.) The pleadings did raise the issue of the assignment from the McPherson Material Company to the plaintiff, but the conduct of the parties on the trial of the case was such as to constitute a waiver by the defendant of plaintiff's proof of the assignment. From the stenographer's minutes this statement

appears, "defense being payment, the defendant takes the affirmative." No objection seems to have been raised to this method of procedure by the defendant; he voluntarily took the affirmative without compelling or imposing upon the plaintiff the burden of proving the assignment of the claim to it, nor is that question elsewhere raised in the record.

I think that from all the evidence the trial justice was justified in holding that the defense of payment had not been successfully sustained, and that there was evidence to support his finding.

The judgment should be affirmed.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

THOMAS G. KNIGHT, Respondent, *v.* ABRAHAM M. MORGENTHOTH,
Appellant, Impleaded with HENRIETTA HEETER and MATILDA
SCHNEIDER.

Examination of a party before trial—not granted to enable a plaintiff to learn whether he has a cause of action—knowledge of the matter by other witnesses.

An order for the examination of a defendant before trial will not be granted where the only purpose thereof is to compel the defendant to disclose to the plaintiff whether or not the latter has a cause of action, and the matters in respect to which the plaintiff desires to examine the defendant are within the knowledge of two persons who are not parties to the action, and who, so far as appears, may be called as witnesses upon the trial.

APPEAL by the defendant, Abraham M. Morgenroth, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 3d day of February, 1904, denying the said defendant's motion to vacate an order directing his examination before trial.

Bertram L. Kraus [Henry B. Wesselman with him on the brief], for the appellant.

Charles Melville Weeks, for the respondent.

WOODWARD, J.:

This action is brought to foreclose a mechanic's lien filed against certain property owned by the defendant Morgenroth, and upon

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the case coming on for argument the defendant interposed an objection in the nature of a demurrer that the complaint did not state facts sufficient to constitute a cause of action, in that it did not allege that at the time of filing the lien in suit there still remained in the hands of the said Morgenroth funds due or to grow due to the contractors, Schneider and Herter, and funds in the hands of the said contractors, due or to grow due to the sub-contractors, Lyman and Costello, to whom the plaintiff furnished the goods for the value of which this action is brought. The plaintiff was permitted to amend his complaint, and an adjournment was granted to allow the plaintiff to discover the evidence necessary to support this new allegation.

The plaintiff thereupon made application under the provisions of sections 870, 871 and 872 of the Code of Civil Procedure, for an order directing Abraham M. Morgenroth, Ernest E. W. Schneider and Henry Herter to submit to an examination before trial, the affidavit of the plaintiff alleging that the testimony of these three men was "material and necessary and indispensable to this plaintiff to enable him to prove the allegation above mentioned," and that "the information sought by the plaintiff is peculiarly and entirely within the knowledge of the persons above named, and is not known to plaintiff," and "that it is impossible for plaintiff in any other way to prove what amounts, if any, were due or to become due at the time of the filing of said lien." The order asked for was granted, and a motion to vacate the same being made upon the papers, the order was vacated as to Schneider and Herter, who were not parties to the action, but was sustained as to Mr. Morgenroth. It thus appears by the plaintiff's affidavit that he will be able to prove his case, if he in fact has a case, by the testimony of Schneider and Herter; that the evidence "is peculiarly and entirely within the knowledge of the persons above named," and the only purpose of this examination appears to be to compel the defendant Morgenroth to disclose to the plaintiff whether or not he has a cause of action. Indeed, plaintiff's counsel, in support of the order, admits that the object of the examination is a mere fishing expedition, for he says: "If the testimony of this defendant should be adverse to plaintiff, then plaintiff should know it in time to hunt up other witnesses and to procure all the evidence of every kind obtainable on the

question." In *Sheehan v. Albany & B. Turnpike Co.* (28 N. Y. St. Repr. 20, 21) it was said that "the provisions for such examination are not intended to enable a party to discover what his opponent's testimony will be, so that he may obtain witnesses to contradict it. Experience shows that if a party discovers what his opponent's testimony will be, and has time enough, he is often successful in discovering also witnesses for contradiction." Both the Appellate Division in the first department and this court have held that it was not proper, either before or after the commencement of an action, to permit an examination for the purpose of enabling the other party to determine whether he had a cause of action. (*Matter of Anthony & Co.*, 42 App. Div. 66, 68; *Long Island Bottlers v. Bottling Brewers*, 65 id. 459.)

We are clearly of opinion that the plaintiff has not shown a proper case for the examination of a party before trial. "The practice of examining a party before trial at the instance of the opposite party should be carefully guarded by the court, so that it may not be productive of evil. When it is evident that the party asking for the examination is sufficiently acquainted with the facts of the case to obtain the proof which he needs, and that, in fact, he desires the examination only to discover to what his opponent will testify, then the order should not be granted, or, if it has been granted, should be set aside." (*Sheehan v. Albany & B. Turnpike Co.*, *supra*.) Two of the witnesses who the plaintiff says are essential to his cause of action are not parties to the suit, and no reason appears why they may not be witnesses upon the trial. We are of opinion that this is not a proper case for the granting of an order compelling the defendant to submit to an examination.

The order appealed from should be reversed, and the order directing the examination should be vacated.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with costs.

In the Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate 3,536, Issued to AXEL J. YOUNG, Appellant.

Liquor tax certificate—use on Sundays of a pavilion used in connection with a bar on week days but separated from the bar on Sundays by a partition—what does, and what does not, constitute a meal—the primary intent of the party controls.

The entrance to a hotel was through a pavilion fitted with folding doors, which were thrown open during business hours. The pavilion was fitted up with tables, and in one corner thereof was a bar. On Sundays the bar was partitioned off from the pavilion by a wood and glass partition, so that, while the bar was fully exposed, it was, in fact, entirely cut off from the pavilion except that a doorway was provided for the use of the proprietor's servants.

Held, that the entire pavilion did not constitute a barroom;

That, consequently, the opening of such pavilion on Sunday did not constitute a violation of clause g of section 31 of the Liquor Tax Law, which prohibits the holder of a liquor tax certificate from having open or unlocked during the hours when the sale of liquor is forbidden any door or entrance to the room or rooms where liquors are sold.

The proprietor of a hotel is not obliged to inquire diligently into the motives which actuate those who frequent his premises.

He has a right, in the absence of knowledge to the contrary, to assume that one who comes into his place and orders a sandwich or any other article of food does so because he desires the nourishment which it affords, and if a single sandwich satisfies the desire of such person, it constitutes a meal, and the proprietor of the hotel has the right to serve liquors to such person with such meal under section 31 of the Liquor Tax Law. (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 812.)

Where, however, persons, who come into the hotel on Sunday, order whisky primarily, and, upon being told that they cannot be served unless they order something to eat, inform the waiter, in the hearing of the bartender and others, that they do not want anything to eat, but order two sandwiches, saying, at the time, that they were not obliged to eat them, and they do not in fact eat them, the sandwiches so served do not constitute a meal nor do the persons ordering them become guests, and the sale of whisky to them is unlawful.

APPEAL by Axel J. Young from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 16th day of May, 1903, granting the petitioner's motion to revoke and cancel a liquor tax certificate theretofore issued to the appellant.

E. B. Barnum, for the appellant.

William E. Schenck, for the respondent.

WOODWARD, J.:

The petitioner in this proceeding alleges a violation of clause a of section 31 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 312), which relates to the selling of liquor on Sunday, or before five o'clock in the morning of Monday; and it is alleged that the respondent was guilty of a violation of clause g of the same section, which prohibits having open or unlocked, during the hours when the sale of liquors is forbidden, any door or entrance to the room or rooms where liquors are sold, etc. The liquor tax certificate involved in this proceeding has been revoked, and the order accomplishing this object is before us for review.

The respondent's answer alleges that he was conducting a hotel, and claims the privileges accorded by section 31 of the statute, and we are clearly of the opinion that he established the fact that he was running a hotel within the meaning of the law. The evidence was uncontradicted that the respondent had a house at Coney Island with twenty-four bedrooms; that he had a kitchen adequate to provide for the feeding of his guests, and that at the time of the alleged violations of the law he was actually harboring between thirty and forty people, and that his dining room contained the required amount of space. It appears that this hotel fronted upon Kensington walk, Coney Island, and that the entrance to the hotel proper was through a pavilion fitted with folding doors which were thrown open during business hours, so that from the walk the place presented the appearance of an inclosure fitted up with tables, etc., after the manner of popular resorts, the front of this inclosure being wide open to the street. In one corner of this pavilion, which appears to have been about forty by fifty feet in dimension, was a bar, which, on Sundays, was partitioned off from the pavilion by a wood and glass partition, so that while the bar was fully exposed, it was in fact cut off entirely from the pavilion, except for a doorway for the use of the servants of the relator, and we are of opinion that, acting in good faith, it was not a violation of the law to have this pavilion open on Sunday for the accommodation of the patrons of this place. The bar was partitioned off from this room, and while this partition was removed during the week, so that the bar stood in the pavilion, we do not think under the circumstances disclosed that the entire room was necessarily dedicated as a barroom, or that any purpose of the

Liquor Tax Law was defeated by permitting this partitioning of the pavilion on Sunday, so that lunches, light drinks, etc., might be sold to the visitors at the beach.

A more serious question is presented, however, by the alleged violation of clause a of section 31 of the Liquor Tax Law. Two special agents of the State Excise Department visited the respondent's place on Sunday, the 31st day of August, 1902, and took a seat at one of the tables in this pavilion and ordered two drinks of whisky. There is some conflict in the evidence as to the details surrounding the delivery of the whisky, but there is no dispute that the special agents did order whisky and that it was delivered to them, and that it was paid for and drunk upon the premises. The respondent claims that he was within the law, however, because there were two sandwiches served with the whisky, which sandwiches were ordered and paid for by the special agents. There can be no reasonable doubt that under some circumstances a sandwich and a drink of whisky or other beverage constitute a meal, under our modern Bohemian system of living; many men in clubs, at restaurants and elsewhere confine their eating at certain periods of the day to a single dish — to a bowl of soup, to a plate of beans, or a sandwich, and there is no particular kind or quantity of food which the law demands for a meal, so far as we have been able to discover, it all depending upon the person to be served and the condition of his appetite. Section 31 of the Liquor Tax Law provides that the keeper of a hotel "may sell liquor to the guests of such hotel, * * * with their meals, or in their rooms therein * * *, but not in the barroom or other similar room of such hotel," and, as we have already suggested, the pavilion in front of the respondent's hotel, as it existed at the time of this alleged violation, was not the barroom or other similar room of such hotel. Section 31 of the statute also provides that a person is a guest of the hotel, within the meaning of the law, "who, during the hours when meals are regularly served therein, resorts to the hotel for the purpose of obtaining and actually orders and obtains at such time, in good faith, a meal therein." We apprehend, under the liberal construction to which a revenue measure is entitled, and considering the forfeiture which is worked by a violation of the provisions of the statute, that it is not the duty of the respondent to inquire diligently into the motives which actuate

those who frequent his premises. He has a right, in the absence of knowledge to the contrary, to assume that one who comes into his place and orders a sandwich or any other article of food, does so because he desires the nourishment which it affords, and if a single sandwich satisfies the desires of the person, it constitutes a meal, and the keeper of a hotel has the right to serve liquors to him with such meal.

The difficulty on this appeal is that the evidence is conclusive that the special agents of the Excise Department entered this pavilion and ordered whisky primarily ; that they were subsequently told that they could not be served unless they ordered something to eat ; that they distinctly told the waiter, in the hearing of the bartender, the respondent's wife and another witness called by the respondent, that they did not want anything to eat, as they had just been to dinner, and that they ordered two sandwiches, saying at the time that they were not obliged to eat them, and that, although the same were placed upon the table, they did not touch them. The respondent's wife, who was present for the purpose of making sandwiches, etc., testifies to these facts ; the waiter who served them, the bartender who overheard the conversation, and another friendly witness all concur in what was said, so that there was no possibility that these sandwiches were served in good faith as a meal, and if they were not, the special agents never became the guests of the respondent under the provisions of section 31 of the statute, and the sale of whisky to them was a clear violation of the law. (*Matter of Schuyler*, 63 App. Div. 206, 210.) This court has refused to give a technical construction to the provisions of this act. We have held that the violation should be of the spirit rather than the letter of the act to justify the harsh penalty of forfeiture of expensive certificates and the sacrifice of business rights (*Matter of Cullinan*, 75 App. Div. 301, 303, and authorities there cited), but when the respondent's own witnesses and servants testify to a state of facts which entirely negatives the idea that the sandwiches were served in good faith as a meal, there is no room for construction, and the law must take its course.

The order appealed from should be affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

MARGARET ROONEY, Respondent, v. MARTIN R. BODKIN and Others, as Executors, etc., of DOMINICK G. BODKIN, Deceased, Appellants.

Will — equitable cause of action in a life tenant against executors who hold possession of the premises in which the life tenure exists — defense that the plaintiff had an adequate remedy at law — costs charged against executors in their individual capacity.

The will of a testator, by the 8th paragraph thereof, provided: "I also give unto my said niece the house and lot No. 288 Clinton Avenue, Brooklyn, subject to the life estate therein of Margaret F. Bodkin; and the houses and lots Nos. 231 and 233 High Street, in Brooklyn. To have and to hold the said three separate parcels of real estate for and during her natural life, with the fee thereof unto her issue her surviving, but in case of her death without issue surviving, I give and devise said three parcels of real estate unto my brother Martin, or in case he shall have died before the termination of said life estates, unto his heirs, *per stirpes*."

The 17th paragraph thereof provided: "I authorize and empower my Executors to take charge of all my real estate, except that directly devised with right of immediate possession to the devisee, and to let, lease, sell and convey the same or any portion thereof. The proceeds derived from the sale of any real estate in which a life interest continues under this will shall be regarded as real estate and be carefully and separately invested by my Executors in order to preserve the interest therein of the life tenant and reversioners. My Executors shall collect the rents and income from all said property and therefrom pay the taxes, repairs and other charges thereon and pay over the net income derived from each portion, or from the investment made in lieu of the real estate to the life tenant entitled thereto."

Subsequent to the probate of the will the testator's niece brought an action against the executors to secure a determination of her rights under the will, alleging that the executors had entered into possession of the High street premises, and that they "have ever since said time collected, and are now collecting, the rents and income thereof, and have and do now claim the right to hold, manage and control the said real estate and to collect the rents issuing therefrom, as testamentary trustees, pursuant to the terms of said last will and testament."

The defendants admitted these allegations, and, upon the trial, the court held that the executors were not entitled to hold the premises against the plaintiff, and that the latter was entitled to an accounting. It also awarded costs against the defendants personally.

Upon an appeal by the executors from so much of the judgment as determined that the Supreme Court sitting as a court of equity had jurisdiction of the action, it was

Hold, that the judgment should be affirmed;

That the facts set forth by the plaintiff were sufficient to constitute an equitable cause of action against the defendants and to entitle the plaintiff to the relief granted;

That the defendants could not successfully urge the objection that the court should have refused to take jurisdiction of the action because the plaintiff had an adequate remedy at law, even if that objection were tenable, as they had neglected to plead that defense in their answer;

That a statement in the answer that proceedings are pending in the Surrogate's Court, and that such court has "ample jurisdiction to determine any disputes that have arisen or may arise between the parties concerned in said estate, that these defendants do not invoke the intervention of the equitable powers of this court for a construction of said will, and they deny that the plaintiff is justified in bringing or maintaining this action," was not a sufficient allegation of the existence of an adequate remedy at law;

That in unlawfully refusing to give the plaintiff possession of the property in question the executors acted personally and not in their representative capacity, and were, therefore, properly charged with costs individually.

APPEAL by the defendants, Martin R. Bodkin, and others, as executors, etc., of Dominick G. Bodkin, deceased, from so much of a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 13th day of July, 1903, as assumes and determines that the Supreme Court in Equity had and properly entertained jurisdiction of this action, and authority to render the judgment therein, and directs the payment of costs by the defendants individually, and also from an order bearing date the 15th day of July, 1903, and entered in said clerk's office, denying the defendants' motion for a new trial made upon the minutes.

John R. Kuhn, for the appellants.

L. J. Morrison, for the respondent.

WOODWARD, J.:

Dominick G. Bodkin, late of the city of New York and borough of Manhattan, died on or about the 26th day of January, 1902, leaving a last will and testament, with codicils, in which he disposed of various pieces of real estate, or the income thereof, and by the 8th paragraph of the said will he gave to the plaintiff the sum of \$5,000, and further provided that "I also give unto my said niece the house and lot No. 288 Clinton Avenue, Brooklyn, subject to the life estate therein of Margaret F. Bodkin; and the houses and lots Nos. 221 and

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223 High Street, in Brooklyn. To have and to hold the said three separate parcels of real estate for and during her natural life, with the fee thereof unto her issue her surviving, but in case of her death without issue surviving, I give and devise said three parcels of real estate unto my brother Martin, or in case he shall have died before the termination of said life estates, unto his heirs, *per stirpes*." By the 17th paragraph of the said will the testator provided that "I authorize and empower my Executors to take charge of all my real estate, except that directly devised with right of immediate possession to the devisee, and to let, lease, sell and convey the same or any portion thereof. The proceeds derived from the sale of any real estate in which a life interest continues under this will shall be regarded as real estate and be carefully and separately invested by my Executors in order to preserve the interest therein of the life tenant and reversioners. My Executors shall collect the rents and income from all said property and therefrom pay the taxes, repairs and other charges thereon and pay over the net income derived from each portion, or from the investment made in lieu of the real estate to the life tenant entitled thereto."

Claiming authority to act under this 17th paragraph of the will, as admitted by the defendants in their answer to the complaint in this action, the defendants entered into possession of the premises at Nos. 221 and 223 High street, and at the time of the trial, eighteen months after the will was admitted to probate, were still in possession of the premises, collecting the rents and profits, and neglecting to account to the plaintiff for the same. The plaintiff brings this action to have her rights under the will determined. She sets forth the facts in reference to the will and its provisions, and alleges that the executors had entered into possession of the premises above mentioned, and that they "have ever since said time collected, and are now collecting, the rents and income thereof, and have and do now claim the right to hold, manage and control the said real estate and to collect the rents issuing therefrom, as testimentary trustees, pursuant to the terms of said last will and testament."

The defendants in answering admit these allegations, and allege that they "have proceeded with due diligence in performance of

their duties as such Executors, have collected the rents from the premises Nos. 221 and 223 High Street, and have therefrom paid the necessary expenses for taxes, insurance, repairs, &c., and are ready and willing to account to plaintiff, as life tenant of said premises, for the net proceeds so collected and to pay the same to her as by the will directed." By this pleading the defendants admit that they are assuming to hold this property (which unquestionably vested in the plaintiff and her heirs, subject to the provisions of the will, immediately upon the death of the testator) as testamentary trustees, yet upon this appeal they urge that a court of equity is without jurisdiction to determine the construction of this will and the rights of the plaintiff thereunder. The learned court at Special Term granted the relief which the plaintiff demanded and awarded costs to the plaintiff, to be paid by the defendants personally. The defendants appeal.

We are not in doubt that the facts set forth by the plaintiff were sufficient to constitute an equitable cause of action against these defendants, who claimed to be acting as testamentary trustees, and we are clear that the learned court has not erred in holding that they were not entitled to hold the premises as against the plaintiff, and that the latter was entitled to an accounting. But were we less clear upon these points, the proposition now urged by the defendants, that the court should have refused jurisdiction because the plaintiff had an adequate remedy at law, is without force. A defendant, when sued in equity, cannot avail himself of the defense that an adequate remedy at law exists unless he pleads that defense in his answer (*Town of Ments v. Cook*, 108 N. Y. 504, 508, and authorities there cited), and we look in vain in the defendants' pleadings for any suggestion that the plaintiff has any other remedy than that which she seeks, though there is a suggestion that proceedings are pending in the Surrogate's Court, and that such court has "ample jurisdiction to determine any disputes that have arisen or may arise between the parties concerned in said estate, that these defendants do not invoke the intervention of the equitable powers of this court for a construction of said will, and they deny that the plaintiff is justified in bringing or maintaining this action." The plaintiff's rights under the will of Mr. Bodkin depended upon the construction of the will; if the defendants were testamentary trans-

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tees, as they claimed to be, then a court of equity unquestionably had jurisdiction, and the plaintiff had no adequate remedy at law, and if they were usurping the duties of a testamentary trustee under an erroneous construction of the will, and were keeping the plaintiff out of her right of possession, it is difficult to understand why, under the pleadings, it was not proper for the court to determine the question of law and to grant the proper relief. There could be no dispute of fact as to the provisions of the will; it presented purely a question of law as to the proper construction, and no material rights of the defendants are involved in the mere technical question of whether the law was determined by a court in its equitable capacity or as a trial court.

On the question of costs, we see no reason for modifying the judgment. The plaintiff was entitled to immediate possession of her property. The defendants unlawfully withheld the property from her, and why the costs of this action, necessary to secure the plaintiff's legal rights, should be taken from the decedent's estate, to the wrong of this plaintiff and others who are not parties to this action, does not appear. The defendants, as executors, had no duties to perform in connection with the High street property, and they, having insisted upon a right to act, to the disadvantage of the plaintiff, and in violation of her legal rights, were acting personally and not as executors, in refusing to give possession of the property, and they are properly chargeable with costs individually. (Code Civ. Proc. § 3246; *Buckland v. Gallup*, 105 N. Y. 453.) The defendants do not appeal from the conclusions of law involved in the judgment, in so far as it relates to the rights of the plaintiff in the High street premises. This is a concession that their possession of the property was illegal, and as the plaintiff is entitled to costs from some one, and the estate is not legally chargeable for the illegal acts of executors, there is no other place for the burden to fall than upon those who have by their misconduct made the action necessary.

The judgment and order appealed from should be affirmed, with costs.

All concurred.

Judgment and order, so far as appealed from, affirmed, with costs.

JAMES BUCKLEY, as Administrator, etc., of JOHN M. GOLDEN, Deceased, Appellant, v. WESTCHESTER LIGHTING COMPANY, Respondent.

Negligence — a person killed by touching a broken live electric wire — what is not a refusal to charge — reiteration of a charge is unnecessary — question of fact for the jury — contributory negligence — preoccupation and forgetfulness inconsistent with the conduct of a reasonably careful man — objection after testimony has been admitted — motion to strike out.

In an action brought against an electric lighting company to recover damages resulting from the death of the plaintiff's intestate, who was killed by coming in contact with one of the defendant's electric light wires, it appeared that some time prior to the accident the wire in question was discovered lying on the ground quite close to a boiler house in which the intestate was employed; that the person who discovered the wire removed it some distance away from the only entrance to the boiler house, and that the intestate, who was aware of the deadly character of the wire, placed boards on and around the wire so as to fence it in; that the defendant sent two linemen to repair the wire, and that upon their arrival one of them took the wire near the door of the boiler house and began to splice it.

The intestate returned to the boiler house, but whether he did so before or after the work of repairing had been commenced was disputed. During the progress of the repairs the intestate stepped out of the boiler house backwards and came in contact with the wire and was killed. The witnesses estimated the time during which the intestate was in the boiler house at from five to twenty minutes.

Held, that the question of the defendant's liability was one of fact for the jury, and that a judgment entered upon a verdict in favor of the defendant should be affirmed;

That the following response, made by the court in answer to a request to charge made by the plaintiff, "Yes. I will not touch that any more than I have," was not susceptible of a construction that the court declined to charge the request;

That it was proper for the court to refuse to reiterate, in language suggested by the plaintiff's counsel, a proposition of law which had been theretofore fully and sufficiently charged;

That it was not error for the court, in answer to a request by the plaintiff's counsel for a charge that "the deceased was lawfully in the boiler house, and was not obliged to apprehend danger from a live wire on the ground immediately at the entrance of the boiler house, if it was not there when he entered the house," to reply, "I will leave all these questions to the jury. It is a question of fact;"

That the following charge, "Whatever was the cause of the breaking of the defendant's wire, and whosoever's fault it may have been, the deceased was

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required to exercise the care of a reasonably prudent man to avoid contact with the wire, and if he knew its location or if he ought to have known it and neglected to keep a reasonably safe distance from the wire, and, therefore, came in contact with it by accidentally stepping upon it, there can be no recovery in this action," was not objectionable in that the court did not charge that the intestate's negligence must be such as contributed to the accident; that such an objection was hypercritical;

That it was proper for the court to charge that "If the deceased, knowing the proximity of this wire and the danger thereof, became preoccupied in any way and forgot about the danger, and his so doing was a failure to remain as alert and watchful as a reasonably careful man should, under the circumstances, then there can be no recovery in this action;"

That, by such charge, the court did not instruct the jury that a recovery by the plaintiff would be defeated by mere preoccupation and forgetfulness on the part of the intestate, but by a preoccupation and forgetfulness which was inconsistent with the conduct of a reasonably careful man under the circumstances.

Where incompetent testimony is admitted and objection and exception are not taken until subsequent to the admission of the testimony, no legal error is presented.

The remedy in such case is by motion to strike it out.

HOOKEE, J., dissented.

APPEAL by the plaintiff, James Buckley, as administrator, etc., of John M. Golden, deceased, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 21st day of March, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 5th day of March, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

Jacob Marks, for the appellant.

Frank Verner Johnson [E. Clyde Sherwood with him on the brief], for the respondent.

JENKS, J.:

The plaintiff charges an electric lighting company with negligence in that it permitted its wire to be and to remain out of repair and broken, and yet alive, whereby plaintiff's intestate, then upon a public street, came into contact with the wire and was killed. The jury found that "both parties were negligent, and for the defendant."

The intestate was an engineer of a boiler in a building on North street, New Rochelle. In the daytime Mr. Stroebel, a lineman of the New York Telephone Company, saw the wire lying on the ground and sputtering fire. It was then quite close to the boiler house. Mr. Stroebel lifted the wire by tape insulation and placed it close to a pole and in the rear of the boiler house some distance away from its only entrance. Then the intestate placed boards on and around it so as to fence it in. The defendant had been notified of the break, and sent in haste two linemen to repair the wire. Upon their arrival one of them, Mr. Pfeiffer, took the wire back to the sidewalk and they there began the work of repair which was a process of splicing. The wires being repaired were then in the vicinity of the door of the boiler house. The intestate during this work of repair stepped out of the boiler house, and fell dead. In all probability, he came into contact with a live wire. No other cause of his death is suggested, and the attendant circumstances point to death from an electric shock from the wire or wires which were then charged with lethal current. There was dispute whether the intestate went into the boiler house before repairs were begun. Mr. Stroebel, for the plaintiff, testifies that the intestate did enter it before that time, and remained there until he stepped out to his death. But the two linemen testify for the defendant that the intestate was present when they began their work (and one also says when they laid it out), and that Mr. Pfeiffer then told him that there was enough current in the wire to kill six men. But so far as this bears upon the dangerous character of the wire, even Mr. Stroebel testifies that Mr. Pfeiffer warned the intestate of its deadly character, but that the intestate was in the boiler house at that time. In any event, the evidence that the intestate knew of the dangerous character of the wire before the arrival of the repairers is overwhelming. The plaintiff's witness, Mr. Stroebel, testifies that the intestate came out of the boiler house backwards. The witnesses vary from five to twenty minutes in estimating the time during which the intestate was in the boiler house. I think that the case was properly for the jury, and that no reason appears from the facts for disturbing its verdict.

The learned counsel for the appellant insists that the learned court erred in several rulings which are fatal to the judgment. At

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the close of the main charge the court was asked by the plaintiff to charge: "That Golden had the right to assume that while he was inside the boiler house engaged in the performance of his duties, the defendant's employees would not place a live wire near the entrance of that house where it would become dangerous to him." The court replied: "Yes. I will not touch that any more than I have." The appellant says that the court refused to charge the request. I think otherwise. It answered "Yes," thereby in effect so charging the jury. I cannot construe the entire response of the court: "Yes. I will not touch that any more than I have," save as a statement by the court that it would charge and that it did charge the request, but that it would decline to charge further than it had charged in the main body of the charge and in that request. If the exception be to the refusal to charge this request, it is not good because there was no refusal. If the exception be to the declination to charge any further, then, of course, it is not well taken, for the learned counsel should have made further specific requests. The criticism that the answer "Yes. I will not touch that any more than I have," is a refusal, ignores "yes" and the period after it, or assumes that a refusal to go further negatives or retracts the "yes." The learned court, KEOGH, J., had instructed the jury in the main charge: "The plaintiff also insists that he has proven that ordinary care on the part of the men who did this work would have been to have gone back 200 feet to the electric pole and there turned off the current altogether, and that as he was mending and dealing with a thing the deadliness of which is admitted by everybody, ordinary care should have compelled him to have gone back, climbed up this pole and turned off the current. * * * You are confined in this case to deciding whether the defendant's servants were guilty of negligence after they discovered the broken wire and while they were mending it; and you know as well as I that when I speak of care, it means such care as a man of ordinary prudence and ordinary wit would apply to the work he was doing. * * * You must adapt your care to the work you are doing. So in deciding whether these people acted sensibly and prudently and with ordinary care, you must remember what they were doing. * * * I referred to the conditions before the wire broke, to show you that he knew the danger of the wire, what it was, and

that he picked it up with dry wood and put it over the fence. Did he in backing out or walking out of this boiler house, in the way you find he did, use the care and that watchfulness that a man should do stepping near a deadly thing? * * * Now suppose you find that the company's servants were negligent men, and that Golden was not negligent, then you come to the question of how much you should pay him."

The plaintiff's counsel also asked the court to charge: "If the defendant's employees in repairing the broken wire while the deceased was inside the boiler house, carelessly allowed a portion of the live wire to reach the ground near the doorway of the boiler house, and the deceased without knowing the live wire was near the doorway, and, while exercising care, came out of the doorway, and came in contact with the live wire near the door, while stepping out of the door, and received a shock which caused his death, the defendant is responsible. The court: I will leave that to the jury. That is a second summing up. Plaintiff's counsel: I except." The court theretofore had fully and sufficiently charged the law and it was not bound to reiterate it in the proposition presented, or in the form of that proposition. (*Rexter v. Starin*, 73 N. Y. 601.)

The court was also requested by the plaintiff's counsel to charge that "the deceased was lawfully in the boiler house, and was not obliged to apprehend danger from a live wire on the ground immediately at the entrance of the boiler house, if it was not there when he entered the house. The court: I will leave all these questions to the jury. It is a question of fact." Exception was then taken. Whether the intestate was "obliged" to apprehend danger manifestly depended upon the surrounding facts and circumstances. Assume that the jury found that the intestate was fully apprised of the thrice deadly character of the wire, and that it credited the testimony of Mr. Wallace, one of the repairers, that while they were laying out their work, the intestate was "around there," that he stood "for quite a while there in full view of us doing our work," and that he remained in the boiler house only five minutes, or even that while he was in the boiler house, as testified to by plaintiff's witness Stroebel, the linemen then warned him that the wire was alive, can it be said as matter of law that he was not under a legal obligation (*i. e.*, in the exercise of due care, bound) to apprehend

danger even if the wire was not immediately at the entrance when he entered the house. The request is not that he was not to apprehend that a live wire would be near the entrance to the house, but that he was not to apprehend danger from a live wire near the house, if the wire were not near the house when he entered it.

The court, under exception, charged : "Whatever was the cause of the breaking of the defendant's wire, and whosoever's fault it may have been, the deceased was required to exercise the care of a reasonably prudent man to avoid contact with the wire, and if he knew its location or if he ought to have known it and neglected to keep a reasonably safe distance from the wire, and, therefore, came in contact with it by accidentally stepping upon it, there can be no recovery in this action." This is objected to, in that the court did not charge the jury that the intestate's negligence must be such as contributed to the accident. I think this is hypercriticism. The theory of the plaintiff was that death was caused by electrocution. The negligence referred is that of coming in contact with the living wire, which was, of course, a contributing cause.

The court also charged, under the plaintiff's exception : "If the deceased, knowing the proximity of this wire and the danger thereof, became preoccupied in any way and forgot about the danger, and his so doing was a failure to remain as alert and watchful as a reasonably careful man should under the circumstances, then there can be no recovery in this action." The learned counsel for the appellant argues at great length and with much earnestness that the exception is well taken. He places this charge side by side with that made in *Lewis v. Long Island Railroad Co.* (162 N. Y. 60, 61), and then says that we have "almost" the charge condemned in that case. The charge in the *Lewis* case was as follows : "If you find that the engineer of the defendant's train, after seeing the horses attached to the tally-ho in which plaintiff was seated, omitted to do *any act* which might have prevented the collision or might have lessened the danger to plaintiff, defendant was guilty of negligence." The essential and the saving difference for the case at bar is in these words of the learned trial justice : "And his so doing was a failure to remain as *alert and watchful as a reasonably careful man should under the circumstances*." Examination of the opinion in *Lewis'* case will show that the gist of the criticism is that the jury might

have understood that negligence of the defendant might be based upon the omission of the engineer to do any act which the jury, at the time of trial, might have believed would have prevented the collision. The charge in the case at bar is not that mere preoccupation and forgetfulness of the intestate defeated recovery, but a preoccupation and forgetfulness that was inconsistent with the conduct of a reasonably careful man under the circumstances. Under this charge the jury were free to find a verdict for the plaintiff, even though he were preoccupied and forgetful, provided he was, notwithstanding such lapse, in the exercise of due care.

The exception to the testimony that the dangerous character of the wire had been theretofore called to the attention of the intestate is not well taken. The objection was taken subsequent to the testimony, and the remedy of the plaintiff was a motion to strike it out. (*Link v. Sheldon*, 136 N. Y. 1, 9.) Even if erroneously admitted, it bore solely upon the question of notice, which, beyond dispute, was fully proven by competent evidence. In no event, therefore, could it justify the disturbance of the verdict.

The judgment and order should be affirmed, with costs.

All concurred, except HOOKER, J., dissenting.

Judgment and order affirmed, with costs.

ELIZABETH RING, Respondent, v. THE LONG ISLAND REAL ESTATE EXCHANGE AND INVESTMENT COMPANY, Appellant.

Money given to the secretary of an investment company for a mortgage — liability of the company where the mortgage proves to be a forgery — the fact that the secretary has acted as attorney for the lender in other matters does not relieve the company — plea of ultra vires by the company — company not discharged because the mortgage was given by a third person.

In an action brought against the Long Island Real Estate Exchange and Investment Company to recover \$1,500, which the plaintiff claimed to have delivered to that corporation to be invested for her on bond and mortgage, it appeared that the defendant maintained an office, on the windows of which the following sign was displayed: "Long Island Real Estate Exchange and Investment Company, Ignatz Martin, President; Sydney H. Carr, Secretary."

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Both Martin and Carr had desks in the office and Carr's desk stood near a safe marked with the name of the corporation. Carr managed and controlled the business of the corporation.

The plaintiff came to the defendant's office seeking to invest \$4,000 and was introduced to Carr as the defendant's secretary. Carr, after talking with Martin, agreed to take \$1,500 and give the plaintiff a mortgage on certain real property owned by the corporation. The plaintiff paid the \$1,500 to Carr in the presence of Martin and received a bond for the money and a receipt signed by Carr, but no mortgage. A week later she again came to the office and Carr told her that they would take the remaining \$2,500 and give her a mortgage upon property owned by a woman named Peters which was controlled by the corporation. The plaintiff paid the \$2,500 in cash to Carr at his desk in the presence of Martin, and Carr placed the money in the safe marked with the corporation's name. The plaintiff thereupon received a mortgage for \$2,500 executed by Mrs. Peters and also a bond executed by Mrs. Peters and by Carr and Martin individually. No complaint was made in respect to this transaction.

Thereafter Carr informed the plaintiff that the company had lost control of the property proposed as the security for the \$1,500 investment, but that it would substitute other land owned by the company. Martin confirmed the statement and thereafter Carr, Martin and the plaintiff went to view the land. Subsequently the plaintiff was told by Carr in the presence of Martin that one Bender had purchased the land and that he was to give back a mortgage which would be made directly to the plaintiff. A mortgage purporting to have been executed by Bender was then given to the plaintiff in exchange for her receipt for the \$1,500. Payments of interest were made at the defendant's office by Carr who took some receipts running to Bender. On one occasion the money for the payment of the interest on both the bond and mortgages was handed to Carr by Martin.

Subsequently it was discovered that Bender was a myth and the mortgage a forgery; that Carr was a thief and that he had never turned over to the defendant the \$1,500.

Held, that the defendant had, so far as the plaintiff was concerned, clothed Carr with apparent authority to receive the \$1,500 for investment and was estopped from denying that it had received the money for that purpose;

That the fact that Carr was an attorney and counselor at law; that under his name on the defendant's sign there appeared in small letters the words "Conveyancer and Examiner of Titles;" that the plaintiff, after becoming acquainted with Carr as the secretary of the defendant, consulted him with reference to other matters than her investments; that she had received interest from Carr by his personal check and signed receipts running to Bender, did not establish that the plaintiff dealt with Carr personally and not in his official capacity;

That the defendant could not be heard to plead as against the plaintiff that the investment which the payment to it contemplated was *ultra vires*;

That the defendant could not successfully urge that, as the plaintiff was told that the property belonged to Bender and as she accepted a bond and mortgage executed directly by Bender to her, she thereby discharged the company and accepted the obligation of Bender.

APPEAL by the defendant, The Long Island Real Estate Exchange and Investment Company, from a judgment of the County Court of Kings county in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 1st day of June, 1903, upon the decision of the court rendered after a trial before the court without a jury.

Robert H. Wilson, for the appellant.

Isidor Buxbaum, for the respondent.

JENKS, J.:

I am of opinion that the evidence is sufficient to sustain the finding of the learned County Court that the defendant received \$1,500 of the plaintiff for investment on bond and mortgage. The defendant is incorporated under the name of "Long Island Real Estate Exchange and Investment Company," for the purpose of taking, holding and possessing real estate and buildings, and selling, leasing and improving the same. It bought farms, divided them into building lots, took back purchase-money mortgages, assigned such mortgages and exchanged properties. It maintained an office in the borough of Brooklyn. On one window thereof was displayed the sign "Long Island Real Estate Exchange and Investment Company, Ignatz Martin, President; Sydney H. Carr, Secretary," and on the other: "Property Sold and Exchanged." The visitor passed through a railing to find the desk of Secretary Carr on the right and of President Martin on the left. Near Carr's desk stood a safe marked with the name of the corporation. The secretary and treasurer and a former vice-president of the company testifies that Carr, in the discharge of his office, was at his desk almost every day for almost all of the day; that Carr had charge of the books and made the entries therein, drew up bonds, mortgages, deeds, contracts, assignments and all papers on behalf of the corporation, and received and collected all moneys which came into the office. The treasurer had no desk in the office; he came there only occasionally, as the board meetings required his attendance, and his duties were practically assumed by Carr, who deposited the moneys in the bank, and who had charge of the bank account. There were seven directors who theoretically held weekly meetings, but who practically held them only when

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deemed necessary. Carr reported to the board, and it investigated and passed upon his report. For aught that appears, there was no officer or director or representative of the corporation in attendance at the office, save the president, Martin, and the constancy or length of his attendances does not appear. The conclusion is irresistible that Carr, the secretary of the company, so far as the daily routine of its business was concerned, was the active man, the factotum of the company, and that almost all of its transactions were managed and controlled by him, subject to reports to the board. This state of affairs was, of course, due entirely to the passiveness or phlegm of the other officers and of the directors of the corporation. To this office, practically in the control of Carr, or at least under his control, with the president sitting by him, came the plaintiff. She, as one seeking investment, was introduced to Carr as the secretary of the company, and she came to know Martin as the president. She came again and told Carr that she had \$4,000 to invest. Carr told her that he would take \$1,500 thereof, and after talking with Martin said they would give her a mortgage on a house on Pulaski street, owned by the company, and that they would take the remainder of her \$4,000 later. The plaintiff drew \$1,500 from her bank, gave it to Carr in the presence of Martin, and received a bond for the money and a receipt signed by Carr, and, possibly, by Martin also, but no mortgage. At the interval of a week she came again and Carr told her that they would take the remaining \$2,500 on property in Jamaica, and Martin confirmed this statement. Carr told her that Mrs. Peters owned the property, but that the company controlled it. She paid the \$2,500 in cash to Carr at his desk, Martin standing by. Carr counted it, and it was put in the safe marked with defendant's name. The plaintiff thereupon received a bond and mortgage for \$2,500. The bond was executed to the plaintiff by Mrs. Peters, Carr and Martin individually, and the mortgage was executed to the plaintiff by Mrs. Peters. No complaint is made as to this mortgage. Later the plaintiff was informed by Carr that the company had disposed or had lost control of the Pulaski street property proposed as security for the \$1,500 investment, but that it would substitute other land owned by the company in Flatbush. Martin confirmed this statement, and a map of the land was then exhibited. Thereafter Carr, Martin and the plaintiff went to view the

land. The plaintiff was thereafter told by Carr that one Bender had purchased the land, but was giving back a mortgage which would be made to her directly in her own name. The plaintiff gave up her receipt and her bond and took the mortgage. For aught that appears Bender is a myth. Certainly he never owned the land. The plaintiff never investigated the matter, but was lulled to sleep by payments of interest made at the defendant's office by Carr, who took some receipts running to Bender. The mortgage was a forgery Carr was a thief, and, after a time, fled the jurisdiction. The defendant repudiates the entire transaction.

I think that it cannot be heard to deny the receipt of the \$1,500. The defendant held itself out as a real estate investment company, and permitted its business to be entirely managed and controlled by Carr. At least, so far as its business was subject to any daily inspection or supervision, it was only to that of Martin. And the plaintiff says that in all matters so far as Martin concerned himself, he approved and ratified all that Carr did in receiving the money and in investing it. I do not mean to say that Martin was party to Carr's thefts or forgeries. Far from it, for there is not the slightest proof of this, but that does not alter the effect of his conduct so far as this plaintiff is concerned. Martin may have supposed, and I give him the credit that he did suppose, that Carr would invest the money or had invested it. But in any event, the evidence is clear that the other officers of the defendant were lax to the last degree, and that the only officer who appears to have participated in the business was blind or was hoodwinked. Here, then, is a real estate and investment company which permitted its routine affairs to be wholly managed by one man, and who invited investors in real estate. When the plaintiff entered the office to make an investment, to whom else could she apply? She had the assurance of the secretary, whose acts were affirmed by the president. The company held itself out as an investment company. The plaintiff was told by the secretary and by the president that it would accept her money for investment, and it was thereupon paid to and accepted by them. In one instance it was deposited in the safe of the defendant in the presence of the plaintiff.

There can be little doubt, to say the least, that Carr, as secretary, was clothed by the defendant with the apparent authority to receive

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that money for investment, and so far as the plaintiff is concerned, it is enough if the acts or the omissions of the defendant gave Carr such apparent authority. The principle is well stated by BROWN, J., in *Edwards v. Dooley* (120 N. Y. 540, 551): "While a principal is bound by his agent's acts when he justifies a party dealing with his agent in believing that he has given to the agent authority to do those acts, he is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent. That is, he is bound equally by the authority he actually gives, and by that which, by his acts, he appears to give. For the appearance of authority he is responsible only so far as he has caused that appearance." (See, too, *Timpson v. Allen*, 149 N. Y. 513, 519.) The act of Carr, in receiving the money as for the defendant for an investment, was connected with the "semblance of authority which he possessed as the defendant's agent," within the limitation expressed in *Manhattan Life Ins. Co. v. F. S. S. & G. S. F. R. R. Co.* (139 N. Y. 146), reiterated in *Knox v. Eden Musee Co.* (148 id. 441, 457). If not within the exact letter of his authority, nothing could nearer resemble it, for the secretary of a real estate investment company, having full charge of its affairs, receiving all moneys, preparing all papers and the like, received a certain sum for investment in real estate, with the approval and acquiescence of the president thereof. Certainly, the act of receiving the money of the plaintiff by Carr as the secretary of the company was not an act extrinsic to his usual employment or his duties, and it was, also, one in harmony with the duties of a principal officer and the practical general manager of an investment company. I think that the defendant is estopped (*New York & New Haven R. R. Co. v. Schuyler*, 34 N. Y. 59, 60; *Hannon v. Siegel-Cooper Co.*, 167 id. 244), and of the two, the plaintiff must be regarded as the innocent person who shall not suffer. (*Walsh v. Hartford Fire Insurance Co.*, 73 N. Y. 5.)

The able and learned counsel for the appellant, in his printed points, frankly admits that there might be ordinarily some force in the suggestion that innocent third parties might have been misled, but asserts that there is none in this case, because it appeared that the plaintiff had employed Carr as a lawyer, and that he had carried on considerable law business for her. The plaintiff testifies that she

had had some trouble with reference to some abuse of her granddaughter, and that in 1901, after her acquaintance with Carr, she asked his advice, but never employed him as a lawyer, and that at her instance Carr had guardianship papers prepared, and advised her relative to the will of an ancestor. I cannot see that the principle invoked is at all affected by the fact that the plaintiff, after she had become acquainted with Carr, as the secretary of the defendant at its office, consulted him with reference to either of such matters. The defendant also insists that the plaintiff dealt personally with Carr, and not in his official capacity. Under the sign of the corporation and the blazing of Carr's secretaryship therein, there also appeared in small letters Carr's name as "Conveyancer and Examiner of Titles." It is testified that Carr was permitted to carry on a private business in the company's office. These facts alone, merely coupled with the failure of proof that the company ever received the money from Carr, or with the proof that it did not receive it from him, are not sufficient to disturb the findings of the learned County Court. The failure of Carr to turn over the moneys establishes nothing more than his theft thereof. And there is no question but that he was, generally speaking, a thief. The facts that the plaintiff received interest from Carr by his personal check, or signed receipts running to Bender, are not sufficient to establish that her transactions were not presumed by her to be with or through the defendant, or that she was not justified in presuming that the money had been paid to the company and received by it for investment. Moreover, the plaintiff testifies that on one occasion, when she called at the office for interest, Martin, the president of the defendant, handed Carr her interest money on the \$1,500 mortgage and on the \$2,500 mortgage as well.

The defendant having received the money cannot be heard to plead as against the plaintiff that such investment as the payment to it contemplated was *ultra vires*. (*Pratt v. Short*, 79 N. Y. 437; *Rome Savings Bank v. Krug*, 102 id. 331.) Nor should the plea that as the plaintiff was told that the property belonged to Bender, and that as she accepted the bond and mortgage directly, thereby she acquiesced therein and discharged the company, prevail, on the theory that she ratified such act and discharged the company in favor of Bender. For having accepted the money, the defendant

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was bound either to return it to her or to invest it for her. It is liable for the fraud or wrongdoing or negligence of its agents or servants. (*Craigie v. Hadley*, 99 N. Y. 131; *Fifth Avenue Bank v. F. S. S. & G. S. F. R. R. Co.*, 137 id. 231; *New York & New Haven R. R. Co. v. Schuyler*, *supra*.) She had a right to rely upon a fair and due performance of the obligation assumed by the defendant when it accepted her money, and it cannot acquit itself merely by showing that she accepted from its officers a forged mortgage. Moreover, the plaintiff also testifies that she was told by Carr in the presence of Martin that the company owned these lots, and that they had sold them to Bender, who was giving a mortgage back. This was virtually an assurance that the company, about to take a mortgage on account of its sale to Bender, instead of so doing transferred it to the plaintiff in exchange for her payment to it of \$1,500.

The judgment should be affirmed, with costs.

All concurred.

Judgment of the County Court of Kings county affirmed, with costs.

JAMES D. ROMAN, Appellant, v. EDMUND K. TAYLOR, Respondent.

Landlord and tenant — clauses in a lease which makes section 197 of the Real Property Law inapplicable thereto — what injury to demised premises from water used in extinguishing a fire in another part of the building renders the premises untenantable.

The following clause contained in a lease: "The tenant shall, in case of fire, give immediate notice thereof to the landlord, who shall thereupon cause the damage to be repaired as soon as reasonably and conveniently may be, but if the premises be so damaged that the landlord shall decide to rebuild, the term shall cease, and the accrued rent be paid up to the time of the fire," removes the leased premises from the operation of section 197 of the Real Property Law (Laws of 1896, chap. 547), which provides that "where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause, as to be untenantable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner rent for the time subsequent to the surrender."

What damage to demised premises caused solely by water used in extinguishing a fire in another portion of the building, of which the demised premises were a part, renders the premises untenantable and unfit for occupancy and entitles the tenant, in the absence of a contrary provision in the lease, to vacate them, pursuant to section 197 of the Real Property Law, considered.

APPEAL by the plaintiff, James D. Roman, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendant, entered on the 15th day of June, 1903, dismissing the complaint upon the merits.

William H. Hamilton, for the appellant.

G. Murray Hulbert, for the respondent.

WOODWARD, J.:

The defendant in this action was the lessee of one of the first flats in the apartment house at 516 and 518 Washington avenue, Brooklyn. His lease term was from May 1, 1902, to May 1, 1903, and he undertook to pay forty-five dollars monthly in advance for the leased premises. The rent for the month of February, 1903, had been paid. About midnight of the nineteenth day of February a fire occurred upon the roof of the apartment house. There were three floors above those occupied by the defendant, and it seems to be conceded that no damage from the fire resulted to the defendant. By reason, however, of the water used in extinguishing the fire, the building was flooded, and the evidence is sufficient to support the fact, necessarily found in the decision of the learned justice of the Municipal Court, that the premises became untenantable because of the presence of this water. The defendant moved out of the flat, and this action is brought to recover two months' rent of the premises (for March and April, 1903), less forty-eight dollars and eighty-four cents rent insurance money received by the landlord for thirty-three days' period of repairs which the landlord was willing to allow to the tenant. The court below dismissed the complaint upon the merits, and the plaintiff appeals to this court.

Section 197 of the Real Property Law (Laws of 1896, chap. 547) provides that "where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause, as to be untenantable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant

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may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner rent for the time subsequent to the surrender." The defendant, under the facts fairly established by the evidence, was justified in holding the flat in question to be untenantable and unfit for occupancy; it was in evidence that the water stood several inches deep upon the floors; that the plastering fell off, and generally that the premises were in such a condition that a prudent person would hardly care to remain in the rooms, and the fact that the plaintiff does not contend that the repairs had been made and the flat put in condition for occupancy for over one month, for which time he was willing to rebate the rent, is sufficient to justify the removal.

The only remaining question is one of law, whether the provisions of the lease were such as to take the case out of the statute enacted for the benefit of tenants. There is only one clause in the lease which has any bearing upon this question, the provisions in reference to ordinary repairs having no relation to the special conditions resulting from the fire, and that is clause 4, which provides that "the tenant shall, in case of fire, give immediate notice thereof to the landlord, who shall thereupon cause the damage to be repaired as soon as reasonably and conveniently may be, but if the premises be so damaged that the landlord shall decide to rebuild, the term shall cease, and the accrued rent be paid up to the time of the fire." This clause of the lease is undoubtedly a covenant on the part of the landlord to repair all damages occasioned by fire when his attention is called to the same, and to this extent is a modification of the general covenant on the part of the lessee to make ordinary repairs. In so far as damages by fire are concerned, the parties have entered into a written agreement which overrides the statutory provisions within the rule recognized in the case of *Butler v. Kidder* (87 N. Y. 98). While it is true that in the case now before us the damage was done by the water used in extinguishing a fire which occurred in another flat under the same roof, we are of opinion that this contingency was fairly within the contemplation of the parties, and that they intended to provide for just such a case as has arisen. The rule is well established that in policies of fire insurance the

company is liable for damages to the insured property due to the use of water in extinguishing the fire (*New York Express Co. v. Traders' Ins. Co.*, 132 Mass. 377, 381), and it seems reasonable that when the parties contracted with reference to fires they intended to embrace the incidental consequences of a fire occurring in the building in which the demised premises were located. If this is the true construction to be put upon the contract, it follows that the case is taken out of the control of section 197 of the Real Property Law, and that the landlord was entitled to recover the rent reserved, less the allowance which he was willing to make for the time the premises were undergoing repairs.

The judgment appealed from should be reversed, with costs.

All concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

J. HOWARD ASHFIELD and LOUIS I. GRIMES, Appellants, v. DAVID K. CASE, Individually, and as Trustee for CHARLES R. PORTERFIELD and MARY AUGUSTA MOTT, Respondent.

Real estate broker—commissions for procuring a loan—producing a party who accepts the application but thereafter refuses to make the loan.

A broker employed to procure a loan upon real estate, who induces a person financially able and otherwise competent to make the loan, to execute a written acceptance of the application for the loan, is not entitled to his commissions, if such person subsequently refuses to make the loan.

APPEAL by the plaintiffs, J. Howard Ashfield and another, from a judgment of the Municipal Court of the city of New York borough of Brooklyn, in favor of the defendant, entered on the 28th day of January, 1904.

Ralph E. Hemstreet, for the appellants.

David K. Case, respondent, in person.

JENKS, J.:

The action is for brokers' commissions for services in procuring a loan upon real estate. The parties agreed upon the facts. The

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defendant trustee authorized the plaintiffs to procure the loan and promised to pay \$100 commission therefor. The plaintiffs were the efficient cause of procuring Wilson to accept, in writing, the application. Thereupon they reported to the defendant, exhibited the writing, and demanded their commission, which was refused. Wilson was financially able and otherwise competent to enter into the contract, but withdrew his acceptance and refused to make the loan, although the defendant was at all times ready, willing and competent to enter into the contract and never refused to do so.

I think that the judgment must be affirmed upon the authority of *Crasto v. White* (52 Hun, 473). There is indicated in that case a plain distinction between a broker employed to procure a purchaser and one employed to procure a loan, and the reason stated in that opinion need not be quoted or recast by me. The cases cited by the learned counsel for the appellants, save one, involve contracts to procure a purchaser. The single exception is *Gatling v. Central Spar Verein* (67 App. Div. 50). In that case the liability of the defendant is expressly asserted to depend upon the act or misfortune of the defendant in not consummating the transaction, and *Crasto v. White* (*supra*) is cited as an authority.

The judgment should be affirmed, with costs.

All concurred.

Judgment of the Municipal Court affirmed, with costs.

THOMAS M. REED, Respondent, v. THE NEW YORK AND RICHMOND GAS COMPANY, Appellant.

Gas company — liability of, where its servant breaks a cellar door in order to remove a meter — express direction by the gas company need not be shown — act done within scope of employment — punitive damages not allowed — what considered in determining the damages — verdict of \$150 not excessive.

Where a gas company, entitled under section 68 of the Transportation Corporations Law (Laws of 1890, chap. 568) to enter upon a consumer's premises for the purpose of removing a gas meter therefrom, breaks open a cellar door in effecting such entry, it becomes a trespasser *ab initio*.

Where it appears that the gas company issued an order to its servants to collect a specified sum of money from the consumer or to remove the meter, and that

such order was returned to it with a statement that the meter had been removed, the gas company is liable for the trespass, even though it gave no express directions to its servants to break open the door in order to effect the removal.

In such a case the consumer is not entitled to recover punitive damages, in the absence of any evidence that the gas company authorized or ratified its servants' acts, or that the trespass was committed after the unfitness of the servants had become known to the gas company.

The consumer may, however, recover from the gas company compensatory damages, which damages involve a determination as to the extent of the injury, insult, invasion of the privacy and interference with the comfort of the consumer and his family.

The Appellate Division will not set aside, as excessive, a verdict of \$150 rendered in favor of the consumer, although the actual damages to the cellar door which was broken open were merely nominal.

A master may be held liable for the acts of his servant within the general scope of his employment while about the master's business, even though the servant's acts be negligent, wanton or willful.

APPEAL by the defendant, The New York and Richmond Gas Company, from a judgment of the Municipal Court of the city of New York, borough of Richmond, in favor of the plaintiff, entered on the 25th day of January, 1904.

A. E. Walradt, for the appellant.

James Burke, Jr., for the respondent.

JENKS, J.:

The action is for trespass in that servants of the defendant broke open a cellar door in order to take out a meter belonging to the defendant in the premises of the plaintiff. The plaintiff served a bill of particulars wherein he claimed for compensatory damages, \$150; punitive damages, \$75; damages to the cellar door and for the repair of the same, \$25. The learned Municipal Court justice charged the jury that if they believed the servants of the defendant "broke in," they might award "any sum of damages you believe proper up to the limit of \$250." The jury returned a verdict of \$150. The defendant moved for a new trial under section 254 of the Municipal Court Act,* and excepted to the denial of that motion.

* Laws of 1902, chap. 580.—[REP.]

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I cannot say that the damages are excessive. It is true that the counsel for the appellant states in his points: "As to the actual damages to the lock and doors, they were merely nominal," and it is not contended that there was any other injury to the property of the plaintiff. It is also true that the jury upon the evidence could not award punitive damages against this defendant, for there was no proof that it had authorized or ratified its servants' acts, or that this act of the servants was done after the unfitness of the servants was known to the defendant. (*Muckle v. Rochester Railway Co.*, 79 Hun, 32, 38; *Cleghorn v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 44.) But there remains the question of compensatory damages. Compensatory damages embrace the determination of the extent of the injury, insult, invasion of the privacy and interference with the comfort of the plaintiff and his family. (Woodruff, J., in *Ives v. Humphreys*, 1 E. D. Smith, 196.) Under the circumstances, it strikes me that the \$150 found by the jury by way of compensation cannot be said by an appellate court to be excessive.

The point is made that the defendant is not liable. It is liable if the servants' acts were commanded or authorized by it. And it is held that "the authority may be express or implied, and a previous command may be proved either by direct evidence or by any legal evidence which will satisfy the jury." (*Welsh v. Cochran*, 63 N. Y. 181, 184.) There is in evidence an order from the defendant to its servants that they should collect five dollars and forty cents or remove the meter, and a return thereon that it had been removed. This was produced by the defendant on the trial, and, therefore, presumably it had been returned to it by its servants. Even though the master had given no explicit directions to break open the door in order to make the removal, a master may be held liable for the acts of a servant within the general scope of his employment, while about his master's business, even though the act be "negligent, wanton or willful." (*Grimes v. Young*, 51 App. Div. 239, per WILLARD BARTLETT, J., citing *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Ochsenbein v. Shapley*, 85 id. 214; *Burns v. Glens Falls R. R. Co.*, 4 App. Div. 426; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Meehan v. Morewood*, 52 Hun, 566; affd., 126 N. Y. 667.) Conceding that the Transportation Corporations

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Law (*§ 68) gave to the defendant the right of entry, yet the abuse thereof by breaking open the door constituted it a trespasser *ab initio*. (*Six Carpenters' Case*, 8 Coke, 146a; *Adams v. Rivers*, 11 Barb. 390.)

The judgment should be affirmed, with costs.

All concurred.

Judgment of the Municipal Court affirmed, with costs.

In the Matter of the Application of the GEORGE B. WRAY DRUG COMPANY for Voluntary Dissolution.

BENJAMIN S. COMSTOCK and Others, Petitioners, Appellants; HENRY R. HICKS, Receiver, Respondent.

Costs on the dismissal of an appeal to the Court of Appeals.

Where the Court of Appeals dismisses an appeal, "with costs and ten dollars costs of motion," upon a preliminary motion to dismiss the appeal, and not after the argument thereof or upon a motion embodied in the argument, the respondent is not entitled to tax an argument fee in the Court of Appeals.

APPEAL by the petitioners, Benjamin S. Comstock and others, from an order of the Supreme Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 19th day of December, 1903, denying the petitioners' motion for an order amending a bill of costs as retaxed and a judgment theretofore entered in the above-entitled action.

Frank Cochrane, for the appellants.

Ralph Earl Prime, Jr., for the respondent.

JENKS, J.:

This appeal involves the sole question whether the respondent is entitled to tax sixty dollars for argument in the Court of Appeals. This case was disposed of in 176 New York, 555, as follows: "Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the second judicial department,

* Laws of 1890, chap. 566.—[REP.]

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entered April 24, 1903, which affirmed an order of Special Term denying a motion to compel the clerk of Westchester County to certify appellants' papers on appeal. The motion was made upon the grounds that the order appealed from was not a final order in a special proceeding, that no allowance of the appeal had been granted, nor had the Appellate Division certified that any question was involved which ought to be determined by the Court of Appeals. * * * Motion granted and appeal dismissed, with costs, and ten dollars costs of motion." The learned counsel for the respondent cites *White v. Anthony* (23 N. Y. 164) and *Brown v. Leigh* (50 id. 427), submitting that the former case is decisive of his right to the taxation.

In *White v. Anthony* (*supra*) it appears that the appeal was dismissed after the question involved had been submitted for decision on the merits. *Briggs v. Vandenburgh* (22 N. Y. 467), referred to by the reporter in *White's* case, was considered and submitted on printed arguments. In *Brown v. Leigh* (*supra*) it is said that the former order having been reversed, with costs, the plaintiff appellant was entitled to full costs save certain items. Among the items thus inferentially approved is the item of sixty dollars for argument. The pertinency of the decision, however, is found in the further disposition of the court. The court proceeds to say: "But the order of the court, merely setting aside proceedings as irregular, did not affect a substantial right, and, therefore, the appeal must be dismissed, with costs. The costs of the two appeals from orders will about balance each other," etc. From this statement it is inferred that, therefore, the court contemplated that there would be an item of sixty dollars for argument taxable on the appeal dismissing the order. But it does not appear whether the question involved in the appeal dismissed had been submitted for decision on the merits. On the other hand, in *Kanouse v. Martin* (2 Sandf. 739) the court, MASON, J. (on advising with SANDFORD and DUER, JJ.), after noting that the statute says "for argument fifty dollars," says: "But the cause was not argued nor was the appeal dismissed when the cause was called in its order on the calendar, in which case, if the respondent had appeared and been ready to argue, he would, on default of the appellant, have been entitled to this fee (citing authorities). But the appeal was dismissed on motion, and the allowance of ten

dollars costs of the motion excludes the idea of the allowance of the argument fee." In *Tauton v. Groh* (9 Abb. Pr. [N. S.] 453) a note says: "By the present usage of the Court of Appeals, appeals from orders go upon the calendar, and full costs are allowable the same as in other appeals. If such an appeal were dismissed on motion, costs would be allowed for the motion, and taxable costs on the appeal, as in other cases, up to the time of the motion. If, on argument of such an appeal, the court should dismiss it because the order was not appealable, full costs would be allowed, as in other calendar cases."

We are not cited to any authority that seems controlling, and I have failed to find one. I think that the discrimination between *White's Case (supra)* and this case is to be found in the fact that *White's* case had been submitted on the merits as expressly stated by the court in its opinion. I doubt not that if the disposition of dismissal had been made in the present case after the same had been submitted on the merits or heard thereon, that costs of argument would be taxable. But where the dismissal is the result of a preliminary motion, and not the result of a hearing, or a motion embodied in the hearing, it does not seem to me that the court intended to permit taxation of a fee for argument. The allowance of ten dollars motion costs seems to exclude that theory. If this were not so, then the one who preliminarily moves to dismiss an appeal and succeeds would be entitled to recover all costs that could be gained by an argument thereof if successful, and ten dollars costs additional thereto. This, tested by the theory of compensation, would seem absurd.

The order should be reversed, with ten dollars costs and disbursements.

All concurred.

Order reversed, with ten dollars costs and disbursements, and retaxation ordered in accordance with opinion of JENKS, J.

MINNIE A. BLANCHARD, Respondent, *v.* GORDON B. ARCHER and Others, Appellants, Impleaded with WILLIAM C. JOHNSON, Respondent, and Others, Defendants.

Contract — when time is of the essence thereof — an acceptance is not sufficient — the time runs from the date not the delivery of the contract — an agreement signed with the agent's seal does not bind the principal.

The following provision in a contract for the sale of land, "It is hereby understood and agreed that this contract shall be binding and in full force and effect up to and including the 27 of November, 1902, at after* which date the same shall terminate and become void and of no effect whatsoever," makes time of the essence of the contract and neither party thereto may insist upon a performance of such contract subsequent to November 27, 1902.

A letter sent by the contract vendee to the attorney for the contract vendors, stating, "I hereby notify you of my acceptance of the proposition stated in said instrument, namely, to purchase the property known as the Archer Farm, containing ninety-seven acres, more or less, for the sum of Thirty-two Thousand Dollars. I would thank you to send me the deed of the property, together with any title papers you may have, so that a contract may be prepared accordingly," does not satisfy the terms of the agreement.

The general rule is that the time limited by a contract for the performance thereof runs from the date of the contract and not from the delivery thereof, unless, owing to a delay in the delivery, performance within the time limited is thereby rendered impossible or unreasonable.

An agreement for the sale of real property executed under his seal by the agent of the owners thereof is not binding upon such owners; the agreement being under seal, the agency cannot be shown with respect thereto.

APPEAL by the defendants, Gordon B. Archer and others, from so much of an interlocutory judgment of the Supreme Court in favor of the plaintiff and the defendant William C. Johnson, entered in the office of the clerk of the county of Westchester on the 18th day of June, 1903, upon the decision of the court rendered after a trial at the Westchester Special Term, as directs the specific performance by said defendants of a contract made by them prior to the commencement of the above-entitled partition action, and from so much of said judgment as adjudges that the defendant William C. Johnson has any rights or claims whatever in the premises described in the complaint herein.

**Sic.*

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William B. Tullis [*John H. Rogan* with him on the brief], for the appellants.

Robert W. Cromley, for the respondent Blanchard.

Ambrose G. Todd, for the respondent Johnson.

JENKS, J.:

The action is in partition. The defendant Johnson pleaded that he was entitled to a conveyance of the interests of other defendants perforce of a contract made prior to the institution of this action. He had sued for a specific performance, but as this action was reached for trial first, the issue of specific performance was tried pursuant to stipulation in this action. The court found for a specific performance, and certain of the defendants appealed from the part of the interlocutory judgment that adjudges it.

The defendant Johnson read in evidence this paper executed by the said defendants, owners of the realty: "This agreement made this 19th day of November, 1902, by and between Phoebe M. Archer, George P. Archer, Gordon B. Archer, Ella M. Taylor, Laura M. Wilson and Emma Stewart, parties of the first part, and Charles Field Griffen, party of the second part, Witnesseth, that for and in consideration of the sum of One (\$1.00) Dollar, to them and each of them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and other good and valuable consideration to them thereunto moving, the parties of the first part jointly and severally hereby agree to sell and convey unto the party of the second part, or his assigns, all that certain farm of land, known as the Archer Farm, situate, lying and being in the Town of Harrison, County of Westchester and State of New York, bounded and described as follows: On the north by North Street; on the east by land now or late belonging to the Matthew's estate; on the south by land of William Haviland and Henry Seymour, and on the west by the Mamaroneck River; for the sum of Thirty-two Thousand (\$32,000) Dollars. It is hereby understood and agreed that this contract shall be binding and in full force and effect up to and including the 27 of November, 1902, at after* which date the same shall terminate and become void and of no effect whatsoever. Witness our hands and seals the day and year first above written."

* *Sic.*

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He also read in evidence this letter, signed by the said Charles Field Griffen, and sent by him to the person addressed, Mr. Taylor who was an attorney intrusted with the negotiations:

"Nov. 26th, 1902.

" BENJAMIN IRVING TAYLOR, Esq.,

" Port Chester, New York :

" Attorney for George P. Archer, Ella M. Taylor, Phœbe M. Archer, Laura W. Wilson, Emma E. Stewart and Gordon B. Archer.

" DEAR SIR.— Referring to the agreement made on the 19th inst. between the above named parties and myself, I hereby notify you of my acceptance of the proposition stated in said instrument, namely, to purchase the property known as the Archer Farm, containing ninety-seven acres, more or less, for the sum of Thirty-two Thousand Dollars. I would thank you to send me the deed of the property, together with any title papers you may have, so that a contract may be prepared accordingly."

The learned Special Term decided that the execution and delivery of the instrument dated November 20, 1902, and the execution and delivery prior to November 27, 1902, of the instrument dated November 26, 1902, and signed by Mr. Griffen, constituted a contract, and that the said Griffen and his assignee Johnson "having within a reasonable time thereafter been ready to fulfill said contract," specific performance should be decreed. The plea that notwithstanding the expiry of the fixed period of a contract, a party thereto has a reasonable time thereafter to perform his part necessarily negatives the proposition that time was the essence of the contract. Johnson does not pretend that his assignor did aught but send this letter of acceptance within the fixed period, determined by the date, November 27, 1902.

There is strong indication that Griffen did not regard this writing, coupled with his letter of acceptance, as the contract, inasmuch as after his letter a more formal and definite contract was drawn up between Taylor and Griffen. But neither Griffen nor his assignee can declare upon that contract, for reasons which I shall hereafter set forth. Assuming then that the minds of the parties met, the question is whether time is of the essence of the contract in the light of the clause : " It is hereby understood and agreed that this contract shall be binding and in full force and effect up to and

including the 27 of November, 1902, at after* which date the same shall terminate and become void and of no effect whatsoever." It is to be noted that this provision is not limited to the performance of a detail of the agreement, but expressly refers to the very life of the contract itself. Short of the express provision that "time shall be of the essence of this contract," words of more positive or explicit limitation are far to seek.

Fry on Specific Performance (3d Am. ed. § 1045) says: "Time is originally of the essence of the contract in the view of the court of equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract. As this intention may either be separately expressed, or may be implied from the nature or structure of the contract, it follows that time may be originally of the essence of a contract, as to any one or more of its terms, either by virtue of an express condition in the contract itself making it so, or by reason of its being implied." The learned writer notes the oft-quoted language of ALDERSON, B., in *Hipwell v. Knight* (1 Y. & C. Ex. 416): "I do not see, therefore, why, if the parties choose, even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation is not to be carried literally into effect in a court of equity. That is the real contract. The parties had a right to make it. Why, then, should a court of equity interfere to make a new contract which the parties have not made?" (Fry, *supra*, 513, n.) Professor Pomeroy, in his work on Specific Performance (§ 390), says: "It is now thoroughly established that the intention of the parties must govern, and if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, then the time of completion or of performance, or of complying with the terms, will be regarded as essential in equity as much as at law." He cites many cases in the notes. The opinion of KENT, C., in *Benedict v. Lynch* (1 Johns. Ch. 370) is a most thorough and exhaustive discussion of the doctrine. (See, too, *Wells v. Smith*, 2 Edw. Ch. 78; affd., 7 Paige, 22.) In *Merchants' Bank v. Thomson* (55 N. Y. 7, 12) the court say: "Doubtless, the later tendency of courts of equitable juris-

* *Sic.*

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diction is to hold that time is material, and is in many cases of the essence of the contract." (See, too, *Coddington v. Wamsley*, 1 Hun, 585; affd., 60 N. Y. 644.) In *Schmidt v. Reed* (132 N. Y. 108) the court say: "The parties to a contract may, by its terms, make the time of performance essentially important and its observance in that respect requisite to relief. (*Benedict v. Lynch*, 1 Johns. Ch. 370.)" (See, too, *Wat. Spec. Perf.* §§ 436, 461, citing many cases; *Phelps v. I. C. R. R. Co.*, 63 Ill. 468; *Fullerton v. McLaughlin*, 70 Hun, 568; *Westerman v. Means*, 12 Penn. St. 97; *Mason v. Payne*, 47 Mo. 517.) Bispham in his *Principles of Equity* (6th ed. 514) says: "A court of equity will relieve against delay and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract, either for the completion, or for the steps toward completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant when it is said that in equity time is not of the essence of the contract." This language is also quoted in Perkins' *Notes to Sugden on Vendors* (8th Am. ed. *p. 260) as the rule enunciated by a great English judge. (CAIRNS, L. J., in *Tilley v. Thomas*, L. R. 3 Ch. App. 67.)

I think that the mere acceptance by Griffen prior to November twenty-seventh did not satisfy the terms of the agreement. Taylor, the attorney and the alleged agent, who drew up the paper, testifies that he sent it to Mr. Griffen on November twentieth, the day following the date thereof. The general rule is that time runs from the date and not from the delivery, unless owing to delay in the delivery performance within the time limited is thereby rendered impossible or unreasonable. (*Wat. Spec. Perf.* § 464, citing authorities; Perkins' *Sug. Vend.* [8th Am. ed.] *258, note d¹, citing *Goldsmith v. Guild*, 10 Allen, 239.) It is hot suggested that the paper was unreasonably delayed in transit. I think that the construction of the agreement is that neither party could insist upon a performance thereof subsequent to November twenty-seventh.

The defendant cannot rely upon the agreement of Taylor, made

November 27, 1902. It is not contended that Taylor was an owner. The record shows that the agreement was Taylor's agreement, made under his seal. The owners are not bound thereby. Even though Taylor was their agent, this could not be shown with respect to such agreement under seal. (*Denike v. De Graaf*, 87 Hun, 61; affd., 152 N. Y. 650, and authorities cited; *Story Agency* [9th ed.], 175-178.)

The interlocutory judgment in so far as appealed from should be reversed, with costs.

All concurred.

Interlocutory judgment in so far as appealed from reversed, with costs.

ANDREW H. HAMBLEN, Respondent, v. LEWIS GERMAN, Appellant.

Oral agreement contemporaneous with a written contract — when it may be proved — delivery of a life insurance certificate in accordance with an oral agreement, not disturbed although the oral agreement be illegal.

The general rule that no oral prior or contemporaneous agreement can be received in evidence to impeach, vary or in any way affect the terms of a written contract, is subject to the qualification that any independent fact or collateral parol agreement, whether contemporaneous with or preliminary to the main contract in writing, may be proved, provided it does not interfere with the terms of the written contract, though it may relate to the same subject-matter.

Andrew H. Hamblen and his wife executed a written agreement, by which they agreed to give to Lewis German all the property which they then had and to will to him all the property which they might have at their death, in consideration of German's agreement to pay Hamblen's debts and to support him and his wife until their death.

At the time of the execution of the agreement, Hamblen owned, among other things, a seat in the New York Produce Exchange, which had been pledged to a bank as collateral security for a loan. The certificate, while of little financial value of itself, carried with it a right on the part of Hamblen's wife, if she survived him, and on the part of his next of kin, if she did not, to a gratuity fund amounting to \$9,000 or \$10,000. German agreed, by his contract, to pay the dues on the seat in the Produce Exchange and upon the insurance attached to it.

After the execution of the contract, Hamblen paid with money given to him by German the loan for which the seat on the Produce Exchange had been pledged as collateral and delivered the certificate thereof, which had previously

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been assigned in blank, to German. Hamblen claimed that he said nothing whatever at the time he delivered the certificate to German, while German claimed that Hamblen said at that time, "This belongs to you; this is yours." German retained possession of the certificate and paid the dues and assessments accruing thereon until 1902, when Hamblen's wife died. The death of Hamblen's wife having terminated German's prospect of ever receiving any portion of the gratuity fund, he refused to pay any more dues and assessments thereon and claimed the right to sell it.

In an action brought by Hamblen against German to obtain possession of the certificate, and to require German to pay all the assessments and dues accruing upon it during Hamblen's life, it appeared that the defendant, in his answer, claimed title to the certificate under the written agreement, but also claimed title generally by virtue of the transfer and delivery by the plaintiff to him of the certificate assigned in blank.

Held, that if the plaintiff had made an oral agreement to transfer the certificate in question to the defendant, and, in pursuance of such agreement, had voluntarily delivered the certificate to the defendant in accordance with the terms of such oral agreement, the defendant would acquire a good title to the certificate notwithstanding the fact that the oral agreement was invalid and that the defendant could not have legally compelled the performance thereof.

APPEAL by the defendant, Lewis German, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 11th day of June, 1903, upon the decision of the court rendered after a trial at the Kings County Special Term.

Charles H. Fuller, for the appellant.

Emanuel Eschwege, for the respondent.

HIRSCHBERG, P. J.:

The circumstances out of which this controversy arises are unusual. The plaintiff and his wife entered into a written agreement with the defendant on the 1st day of December, 1888, by the terms of which the plaintiff and his wife practically agreed to give to the defendant all the property they had and to will to him all which they might have at death, and the defendant agreed in turn to pay the plaintiff's debts and to support him and his wife until the death of the survivor of them. At the time of the execution of the agreement the plaintiff was the owner of certain real estate in the town of Flatbush, and he also owned personal property consisting of a steam lighter, a seat in

the New York Produce Exchange with the insurance or interest in the guaranty fund attached to it, and two life insurance policies which had been taken for the benefit of his wife. The real estate was mortgaged for \$6,000 and the steam lighter for \$4,000. The certificate representing the seat in the Produce Exchange was pledged with the Corn Exchange Bank as collateral security for a loan of \$1,000 which the bank had made to the plaintiff, and the plaintiff was otherwise indebted in about the sum of \$1,900. The defendant agreed in the written contract referred to to assume and pay off the mortgages, to discharge the debts, to pay the premiums on the life insurance policies and all assessments, premiums and dues on the seat in the Produce Exchange and insurance attached to it. He also agreed, as I have said, to support and maintain the plaintiff and his wife in the style to which they had been accustomed either at Flatbush or elsewhere in the State of New York as the plaintiff might appoint, paying all expenses of removal and of travel in case of a change of residence, to provide for them shelter, clothing and necessities, and to pay them \$250 a year while they both lived, and one-half that sum to the survivor as such during life. In addition to the provision for the execution of their wills by the plaintiff and his wife for the sole benefit of the defendant, the agreement provides that the real estate shall be conveyed to the defendant, the title to the steam lighter transferred to him, and the title to the life insurance policies assigned to him "so far as may be done." No mention is made, however, of the title to the seat in the Produce Exchange, which, while of little financial value in itself, carried with it a right on the part of the plaintiff's wife if she survived him, and on the part of his next of kin if she did not, to a fund by way of guaranty or indemnity amounting to the sum of nine or ten thousand dollars.

The provisions of the agreement appear to have been fairly carried out by the parties, the lawsuit relating only to the title to the certificate representing the seat in the Produce Exchange. In December, 1888, after the execution of the agreement, the defendant gave the plaintiff a check with which to pay off the loan at the Corn Exchange Bank; the plaintiff paid the loan, receiving from the bank the certificate in question, bearing upon its back an assignment in blank which had been signed by him at the time the loan

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was procured ; and he immediately delivered the certificate to the defendant with the indorsement uncanceled. The plaintiff testified that he said nothing whatever at the time of such delivery, and he gave no statement or explanation of the reason for the delivery. The defendant testified that at the time the certificate was delivered to him the plaintiff said : "This belongs to you ; this is yours." The defendant has retained possession of the certificate ever since its delivery and has paid the dues and assessments as agreed until the death of the plaintiff's wife, which occurred on December 20, 1902. The plaintiff has two sons who will be entitled to the gratuity fund on his death, and the defendant shortly after the death of the plaintiff's wife notified the plaintiff that as that event terminated his (the defendant's) chance of ever receiving anything from that source, he desired to dispose of the certificate and declined to pay any more assessments. The judgment determines that the title to the certificate is in the plaintiff, and requires the defendant to deliver possession of it to him, and to pay all the assessments, premiums and dues upon it during the plaintiff's life.

I think the learned trial court erred in excluding evidence which was offered by the defendant for the purpose of showing a verbal understanding or agreement between the parties, entered into at or about the time of the making of the written agreement, providing expressly for the disposition to be made of the certificate in question. The general rule, of course, is well settled that no oral prior or contemporaneous agreement could be received in evidence to impeach, vary or in any way affect the terms of a written contract, but this rule is subject to the qualification that "any independent fact or collateral parol agreement, whether contemporaneous with or preliminary to the main contract in writing, may be proved, provided it does not interfere with the terms of the written contract, though it may relate to the same subject-matter." (21 Am. & Eng. Ency. of Law [2d ed.], 1095, and cases cited.) Whether the excluded evidence would if received have disclosed the existence of such an independent and collateral oral contract need not perhaps be considered on this appeal inasmuch as the learned counsel for the respondent concedes in his brief that the excluded evidence would have been competent if the defendant had pleaded title to the certificate under a separate oral agreement. His contention is that in

the answer the defendant claims title only under the written agreement, and he admits in the brief that "had the defendant set up that such agreement did not contain all the agreements of the parties and that there was another contemporaneous or prior agreement, and defendant claimed title to the certificate under and by virtue of such other agreement, *then such testimony would have been admissible*, but, as heretofore stated, the defendant relies upon the agreement set forth in the complaint and claims title under it, whereas there is nothing contained in the agreement whereby defendant could claim title." Although the defendant in his answer does claim title to the certificate under the written agreement, he also in the 10th paragraph of the answer asserts title generally by virtue of the transfer and delivery by the plaintiff to him of the certificate with the assignment indorsed and signed thereon, and if an agreement to transfer such title was the proper subject of an oral understanding had contemporaneously with the execution of the written contract, I think the pleading is sufficient to justify the reception of the evidence.

I think, however, that the rule of law under consideration has no application to the present action, which is not to enforce the oral agreement, but to recover back property which the defendant claims has been actually transferred and delivered for the purpose of conveying title in pursuance of its terms. Assuming that such an agreement while executory would be wholly invalid and unenforceable, yet the parties would be at liberty to carry it out if they saw fit voluntarily to do so, and if it be true that the plaintiff did deliver the certificate to the defendant for the purpose of transferring title to it in accordance with the terms of an agreement to that effect, the agreement would be completely executed by that act, and a good title would pass, notwithstanding the fact that such execution could not have been legally compelled. No question of public policy is involved, and there is no element of immorality or of illegality such as would exist in the case of a contract contravening the prohibition of positive law. The defendant has been in undisturbed and undisputed possession of the certificate for fourteen years with an apparent title resulting from both the delivery and the blank assignment, and it would seem in the absence of adverse authority to be competent for him under the general rules of evi-

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dence to establish in defense of his right the motive or intent with which he has been so invested by the plaintiff with the apparent ownership by proof that the transfer of title was the voluntary consummation of even an invalid and unenforceable agreement.

The judgment should be reversed.

All concurred.

Judgment reversed and new trial granted, costs to abide the final award of costs.

**TIMOTHY J. SULLIVAN, Appellant, v. JOHN GEORGE SCHMITT,
Respondent.**

Landlord and tenant — a landlord cannot recover rent where a third person rightfully retains possession of a part of the demised premises.

In an action brought by a lessor against a lessee to recover a balance of rent alleged to be due for the month of May, 1902, it appeared that the plaintiff leased the premises to the defendant for one year from May 1, 1902, at the yearly rental of \$900 payable monthly in advance and that the defendant paid \$25 on account of the rent due May first.

When the first day of May arrived, the plaintiff instituted legal proceedings to dispossess one Tobin, a tenant who occupied the ground floor of the premises in question, but it was judicially determined therein that Tobin was still entitled to possession.

The defendant occupied the balance of the premises during the month of May, the plaintiff having requested him to remain during that month and having promised to oust Tobin at the end thereof. On June first the defendant vacated the premises owing to the fact that it appeared that Tobin would remain in possession thereof indefinitely. Tobin remained in possession for many months thereafter and the plaintiff demanded and received rent from him upon his own responsibility and not as agent for the defendant.

Held, that the plaintiff was properly nonsuited.

APPEAL by the plaintiff, Timothy J. Sullivan, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendant, entered on the 24th day of October, 1902, dismissing the plaintiff's complaint.

S. Feuchtwanger, for the appellant.

Jones Cochrane, for the respondent.

HOOKER, J.:

The nonsuit at the close of the plaintiff's evidence was not error. Plaintiff's complaint alleged a cause of action for rent for the month of May, 1902, stating that in April of that year he let and demised the premises in question to the defendant for one year from the 1st of May, 1902, at the yearly rental of \$900, payable monthly in advance; that \$25 was paid, and the balance of the rent payable May first is due. The proof bore out these allegations, and showed that the payment on account was made early in April, but developed the fact that when the first of May arrived and the plaintiff sought by legal process to dispossess one Tobin, who had been a tenant occupying the ground floor of the premises, it was judicially determined that Tobin's right to possession had not come to an end, and exercising that right he remained in possession of the premises during the month of May and for many months thereafter. Not only that, but the plaintiff also demanded and received from Tobin the rent for the ground floor of the premises which he had been accustomed to pay, and this upon his own responsibility and not as agent for the defendant or representing him in any way. The defendant occupied the basement and upper floor of the premises until the first of June when, it appearing that Tobin would remain indefinitely in possession of the ground or "store" floor, the defendant quit. There was some conflict in the evidence as to whether the plaintiff agreed with the defendant to put him into possession of the whole premises on the first of May; but this conflict we deem unimportant, for the reason that, taking the view most favorable to the plaintiff, the whole evidence shows a failure of consideration for the contract. It is true that it is not the duty of a landlord to eject a trespasser, wrongfully in possession, for the benefit of a lessee about to enter (*Gardner v. Keteltas*, 3 Hill, 330; *Ward v. Edesheimer*, 17 N. Y. Supp. 173; 43 N. Y. St. Repr. 138; *Thomson-Houston Electric Co. v. Durant Land Improvement Co.*, 4 Misc. Rep. 207), but here it has been established by competent authority that the plaintiff was without legal right or power to give possession of the ground floor of the premises, and the principle quoted can have no bearing. The portion of the premises in possession of Tobin was a material part thereof; in fact it is fairly to be inferred that it was the principal part thereof. This case should be

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disposed of upon the principles underlying the decision in *Trull v. Granger* (8 N. Y. 115). There it was held that where a landlord after leasing to one, leases to another before the commencement of the term, and by reason thereof the first lessee is deprived of the enjoyment of possession, an action for his damages will lie in his favor against the landlord. Because the plaintiff could not and did not demise the premises, he failed to perform the contract on his part, and was not entitled to maintain this action for rent which is based upon the contract.

By his occupation of the balance of the premises during the month of May, the defendant could not be said to waive his claim to the right of possession of the ground floor, for he was there protesting against Tobin's presence, and it is undisputed that the plaintiff requested him to remain during the month, promising to get rid of Tobin at its end.

The alleged tender by the defendant of the balance of the rent has not the legal effect with which the plaintiff seeks to stamp it. In many cases it is doubtless true, as he urges, that a tender is an admission of the cause of action stated in the complaint to the amount tendered. (*Eaton v. Wells*, 82 N. Y. 576; *Spalding v. Vandercook*, 2 Wend. 431; *Johnston v. Columbian Ins. Co.*, 7 Johns. 315.) The answer of the defendant did not, as was the fact in these cases, plead tender of any particular amount; it contained simply an averment of tender of all that was due to the plaintiff under the contract. But the evidence of all the witnesses called by the plaintiff showed that the defendant's act, which it is sought to construe into a tender, was simply an offer, after the judicial determination of Tobin's right to remain, to pay the balance of rent due, if the plaintiff would give possession of the entire premises; the defendant merely emphasized his offer by producing and exhibiting the cash.

The judgment should be affirmed.

All concurred.

Judgment of the Municipal Court affirmed, with costs.

FREDERICK W. SPARKS, Respondent, *v.* THOMAS L. FOGARTY,
Appellant.

Action for goods sold to a copartnership — all the partners must be made parties defendant — the defect of parties need not be pleaded where one partner is sued and no mention is made of the copartnership — practice in New York Municipal Court.

In an action to recover the value of goods sold and delivered to a copartnership, all of the partners must be made defendants.

Where such an action is brought in the Municipal Court of the city of New York against but one of the partners, and the complaint therein makes no mention of any partnership, the failure to plead the non-joinder of the other partners does not preclude the defendant from raising that objection on the trial.

Sembly, that in the Municipal Court of the city of New York the defense of a non-joinder of parties must ordinarily be raised by answer or it will be deemed to have been waived.

APPEAL by the defendant, Thomas L. Fogarty, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, entered on the 3d day of December, 1903.

Henry A. Rubino, for the appellant.

W. S. Taylor, for the respondent.

HOOKER, J.:

This is an appeal by the defendant from a judgment of the Municipal Court, awarding to the plaintiff the full amount of the plaintiff's claim. The pleadings were oral, and the plaintiff "complained of defendant for goods sold and delivered in the sum of \$163.50." The answer is a general denial. Upon the trial the plaintiff's evidence tended to show that the goods mentioned in the complaint were sold to a partnership, of which the defendant was a member, and not to the defendant individually. While the claim is made by the plaintiff that there is evidence from which the justice might have found that the defendant purchased the goods in his individual capacity, we cannot concur in that view. The substance of the conversations between the parties and the copartner of the defendant, and all of the circumstances surrounding the sale of the goods, preclude the theory that the sale was to the defendant individually. The judgment cannot be sustained under the author-

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ity of *New York Fastener Co. v. Wilatus* (65 App. Div. 467), which case is directly in point, and a further discussion of the legal question involved in this case is, therefore, unnecessary.

The plaintiff's claim that the defendant has waived a non-joinder of his copartner, and that, therefore, the judgment must be affirmed, is without merit. While it is no doubt true that the non-joinder of necessary parties must be raised in the Municipal Court by answer or be deemed to be waived (*Amsterdam Electric Light Co. v. Rayher*, 43 App. Div. 602), it is sufficient to note that the complaint alleged an indebtedness of an individual defendant and made no mention of a partnership relation. Had the plaintiff seen fit to amend his pleading so as to allege a sale to the partnership, of which the defendant was a member, and thereupon the defendant had not amended his answer by raising the question of non-joinder, the plaintiff's contention might prevail, but the plaintiff distinctly refused to adopt the suggestion made upon the trial that he amend his complaint in that respect, and the defendant by his general denial to the complaint, as it stood, raised an issue that the goods were not sold to him. All the proof substantiated the defendant's claim, and upon the authority of *New York Fastener Co. v. Wilatus* (*supra*), the judgment of the Municipal Court must be reversed.

Judgment reversed, with costs.

All concurred.

Jndgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. CHARLES HOFFMANN, Relator, v. JOHN N. PARTRIDGE, as Police Commissioner of the City of New York, Respondent.

New York police—trial before a deputy police commissioner, who, without deciding upon the guilt of the accused, reports the evidence to the commissioner—an adjudication by the latter is void.

A deputy police commissioner of the city of New York may not conduct the trial of a member of the police force upon charges preferred against the latter and thereafter report the evidence to the police commissioner without determining the guilt or innocence of the accused member, or making any recom-

mendation in respect thereto, and leave to the police commissioner the duty of passing upon the sufficiency of the evidence in the absence of the accused officer, and without notice to him or giving him an opportunity to be heard. In such a case the act of the police commissioner in adjudging the accused member guilty and dismissing him from the force is void.

CERTIORARI issued out of the Supreme Court and attested on the 23d day of June, 1902, directed to John N. Partridge, as police commissioner of the city of New York, commanding him to certify and return to the office of the clerk of the county of Kings all and singular his proceedings had in dismissing the relator from the police force of the city of New York.

Louis J. Grant, for the relator.

James D. Bell, for the respondent.

HOOKER, J.:

The relator was a police officer of the city of New York. On the 5th day of February, 1902, charges were lodged against him for violation of certain rules of the department, and conduct unbecoming an officer. The matter was referred by the police commissioner to the second deputy police commissioner, who heard the oral proofs of the parties and their witnesses. The return shows that at the completion of the evidence the proofs were closed and decision was reserved. Thereafter, and without any order, finding or recommendation in the premises having been made by the deputy commissioner, the police commissioner himself entered an order convicting the relator of the charges upon which he had been tried, and determining, upon such conviction, that said relator be dismissed from the police force of the police department of the city of New York. The relator claims that the dismissal was unwarranted and void, for the reason that no conviction or finding on the evidence was made by the deputy who heard the case. There is no statutory authority permitting procedure such as is revealed by the record before us to have been adopted in the conviction and dismissal of the relator, and in the absence of such statutory authority the deputy may not conduct the trial and thereafter report the evidence to the commissioner, without determining the guilt or innocence of the relator, or making recommendation in respect thereof, and leave to the latter the duty to pass upon the sufficiency of the

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evidence, in the absence of the accused officer, without notice to him or giving him an opportunity to be heard before the head of the department. The case of *People ex rel. De Vries v. Hamilton* (84 App. Div. 369) was a certiorari to review the determination of the respondent, the county clerk of the county of New York, in dismissing an accused employee from his office. The trial was had before a deputy clerk, in the absence of the county clerk by reason of illness, and the former made no recommendation or finding of guilt or innocence, but left the matter to the county clerk for his determination upon the evidence taken before the deputy. Mr. Justice HATCH, writing for the Appellate Division in the first department, said concerning such procedure: "We have no difficulty, therefore, in sustaining this proceeding, so far as the authority of the deputy is concerned to take the proof and conduct the trial. The difficulty which the case presents lies in the fact that the deputy, having entered upon the trial, did not continue to perform the duties which had been devolved upon him to a conclusion. In hearing and determining upon the sufficiency of the proof in support of the charge, the deputy acted in a *quasi* judicial proceeding and exercised judicial authority in reaching a conclusion upon the weight of the testimony, the extent and character of the punishment which should be imposed. We are cited to no authority, except as will hereafter be noticed, nor have we found any, either statutory or otherwise, authorizing a deputy to perform the duties of his chief, take the proof offered upon the hearing, and then pass the proceeding over to the clerk to make the determination. The judgment which is pronounced in such case involves a determination upon the merits and the exercise of discretionary power thereon. The basis therefor is found to a large extent in the impressions produced upon the mind of the officer from the appearance and candor of the witnesses, and is common and material to all judicial proceedings. This has been held to be a prime factor in determining the weight of the testimony and in control of the punishment which ought to be inflicted. It is substantial in its nature and courts have uniformly attached great weight thereto, making it a controlling element in their determination in many cases. In the orderly course of judicial procedure a trial may not be severed so that one functionary may take the proof and another make the

determination. Such power has never been exercised, so far as we are aware, unless it was conferred by statutory enactment."

People ex rel. Reidy v. Grady (26 App. Div. 592), while not deciding this precise question, supports the authority of the principles underlying the *De Vries Case* (*supra*). This court has recently taken occasion to criticise procedure such as that indulged in by the commissioner toward this relator. In *People ex rel. Callan v. Partridge* (87 App. Div. 573) Mr. Justice BARTLETT, writing for the court, said: "Where a member of the police force is tried before a deputy commissioner, there should be an express finding one way or the other by that officer, declaring the accused guilty or not guilty of the charge against him, and this finding should be set out in writing in the report of the proceedings made to the head of the police department."

It follows that the act of the commissioner in dismissing this relator from the force was without authority and void, and the determination should be reversed, with costs.

All concurred.

Determination annulled, with costs.

DANIEL J. EARLY, as Trustee in Bankruptcy of the Estate of WILLIAM H. BARD, Appellant, v. WILLIAM H. BARD and Others, Respondents.

Vacation of judgment not granted upon the mere allegation of a party that his attorney acted negligently, unwise and improperly — terms imposed.

A judgment rendered against the defendant in an action after a trial thereof at which he and his attorney were present, but at which no evidence was offered in his behalf, will not be vacated upon the mere allegation of the defendant, unsupported by proof, that the action of his attorney in failing to introduce evidence in defense was negligent, unwise and improper.

In any event such relief should only be granted upon condition that the defendant should pay the costs of the action and of the motion.

APPEAL by the plaintiff, Daniel J. Early, as trustee in bankruptcy of the estate of William H. Bard, from an order of the Supreme Court, made at the Kings County Special Term and entered in the

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office of the clerk of the county of Westchester on the 28th day of January, 1904, vacating and setting aside a judgment theretofore entered in the action in favor of the plaintiff.

G. A. Seixas, for the appellant.

Eugene Archer, for the respondents.

HIRSCHBERG, P. J.:

This action is brought by the plaintiff, as the trustee in bankruptcy of William H. Bard, against the said William H. Bard, his daughter, Harriet E. Bard, and another defendant, for the purpose of setting aside conveyances of real estate alleged to have been fraudulently made by the defendant William H. Bard to the other defendants. The answer of the defendant William H. Bard is a general denial. The case was duly tried and resulted in a decision and judgment in favor of the plaintiff. By the order appealed from the judgment is vacated and set aside, and to quote the language of the order "the inquest opened and the said defendants let in to defend the action, with the right to serve a further answer to the complaint herein, within twenty days from the date of this order, on payment of \$30.00 costs."

If the motion made on behalf of the defendants to vacate and set aside the judgment could be granted at all, it should be done only upon the imposition as terms of the payment of the costs of the action and of the motion. But on the papers appearing in the present record no reason whatever is disclosed for the granting of the motion. There was no inquest or default taken by the plaintiff, but it appears without dispute that the action was fully tried before the same justice of the Supreme Court by whom the order appealed from was granted and in the presence of the defendant William H. Bard and his counsel. The evidence offered by the plaintiff on the trial consisted chiefly of the depositions or examinations of the defendant William H. Bard and his daughter which had previously been taken in the bankruptcy proceedings, and the oral examination of the other defendant, who was also cross-examined by counsel on behalf of the defendants. The defendants' counsel, after consultation with the defendant William H. Bard, rested the case upon the plaintiff's evidence, decision was reserved and time given for the

submission of briefs. Briefs were duly submitted on each side, and about a month after the trial the decision of the court in favor of the plaintiff was announced.

The defendant William H. Bard makes two affidavits in support of the motion and they are the only affidavits presented on that side. In the first affidavit he states that at the trial his attorney "negligently, unwiseley and improperly refused to put in evidence in defense, and permitted the plaintiff to obtain judgment solely upon the evidence introduced on the part of the plaintiff; that by reason of said misconduct of said attorney the plaintiff recovered a decision and judgment," etc. In the second affidavit he alleges that "by reason of the misconduct and neglect of said attorney in this proceeding also in failing to put in evidence in defense, and in other ways, deponent was placed in a very false and untrue light, and in consequence a very harsh and unjust decision was made against him." There is no allegation tending in any way to establish that the defendants had any evidence; certainly no disclosure of the nature and purport of such evidence; no hint or suggestion that the case was closed and submitted as it was without the full knowledge, consent and concurrence of the defendants, and no fact of any kind tending in the slightest degree to indicate that the defendants' attorney was guilty of any misconduct, or that his course at the trial was not prompted by wisdom and good judgment. The order appealed from grants a new trial of the action upon the mere expression of the opinion of one of the defeated parties that their attorney acted unwiseley and improperly in not putting in evidence upon the trial in their behalf.

The order was granted upon the authority of the case of *Gideon v. Dwyer* (17 Misc. Rep. 233). That was the case, however, of the opening of a *default* which had been taken upon the defendant's failure to answer, and it consequently has no application here. It is not doubted that the court in a proper case can relieve a party from a judgment obtained by the fraud of his attorney, and perhaps from one obtained through his negligence or ignorance. But the proof offered to justify such relief should be of facts which are clear and convincing in their nature and effect, and the relief should be afforded only on conditions calculated to fully protect the rights and interests of the other party or parties to the action. (See *Sharp v.*

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Mayor, 31 Barb. 578, and *Levy v. Joyce*, 1 Bosw. 622.) In *Anderson v. Carr* (54 Hun, 634; reported in full in 7 N. Y. Supp. 281) the former General Term in this department held that where judgment had been rendered against a defendant with his consent upon compromise of a claim, he could not have it vacated on the ground that he acted on the erroneous advice of counsel, in the absence of proof of fraud. But no authority can be found for the granting to a defeated litigant of the right to a new trial upon the mere assertion of his opinion, unsupported by proof, that his case was not tried properly, wisely or well.

The order should be reversed and the motion denied, but as the justice who presided at the trial granted the order and may have been apprised of facts appearing upon the trial not disclosed in the present record, the decision should be without prejudice to a timely renewal of the motion upon proper and sufficient papers.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion denied, with costs, but without prejudice to a renewal of the motion at Special Term upon sufficient papers.

HELEN HUBER and Others, as Executors, etc., of OTTO HUBER, Deceased, Appellants, v. FRANKLIN B. CASE, JR., and Others, Defendants.

WILLIAM H. D'ESTERRE, Respondent.

Motion by a purchaser to be relieved from a purchase at a mortgage foreclosure sale — what deed is not an exercise of a power of sale — a deed and declarations made by a widow and children, insufficient where there are contingent remainders — character of partnership real property.

Upon a motion by the purchaser at a mortgage foreclosure sale to be relieved from his purchase, it appeared that the property was conveyed by deed to Cornelius C. Poillon and Richard Poillon as tenants in common; that Cornelius C. Poillon died, leaving surviving him a widow and five children; that, by the terms of his will, he directed his executors to divide his estate into three equal shares, to pay to the widow during life in lieu of dower the income of one of the shares, the principal of such share being devised and bequeathed upon her death to his children, to be divided equally among them, "the issue of any

deceased child or children to take the share which his, her or their parent would have been entitled to if living;" that the will also empowered the testator's executors to sell his real and personal estate, "either for cash or part on bond and mortgage, as they may in their discretion deem advisable."

It further appeared that after the testator's death his widow and surviving children and his executors executed to the said Richard Poillon a deed which recited, "whereas the said Cornelius Poillon (lately deceased) and the said Richard Poillon party hereto of the fourth part were heretofore in the lifetime of the said Cornelius *seized as tenants in common* of the real estate herein-after described with other property and the parties hereto *have arranged a division* of all said real estate held in common whereby the property herein-after described belonged to the said party of the fourth part and the said party of the first part accepts the provision made for her by the will of said Cornelius Poillon, deceased, in lieu of her dower in his real estate," and which, in consideration of the conveyance by Richard Poillon to the sons of the said Cornelius C. Poillon of the shares in the real estate which had been set off to them in the division, granted and conveyed to Richard Poillon the premises in question.

In answer to the purchaser's motion, one of the executors of Cornelius C. Poillon alleged that the property in question was partnership property belonging to a copartnership consisting of Cornelius C. Poillon and Richard Poillon, having been purchased with partnership funds and should be treated as personal property.

The court having granted the purchaser's motion, formal declarations to the effect that the property was partnership property were executed, acknowledged and recorded by the surviving executor of Richard Poillon and by the widow, executors and surviving children of Cornelius C. Poillon. A motion was then made to vacate the order relieving the purchaser from his purchase.

Held, that the deed to Richard Poillon could not be regarded as an exercise of the power of sale conferred on the executors of Cornelius C. Poillon;

That such deed was not sufficient to pass the title vested in the heirs of Cornelius C. Poillon, as it did not and could not dispose of the interest passing, upon the widow's death, to the issue of deceased children of the testator;

That, even if the shares passing to the testator's children were vested, they were subject to be divested in favor of their issue by their death prior to that of the widow;

That, assuming that the declarations that the property in question was partnership property were sufficient to effect a conversion of such property into personality, an adjudication to that effect would not be binding upon a future claimant under the will of the said Cornelius C. Poillon, and that a purchaser of the premises would be compelled to resort to parol proof if his title was attacked by such a claimant;

That, consequently, the motion to vacate the order relieving the purchaser from his purchase should have been denied.

In the absence of an agreement, express or implied, between the partners to the contrary, partnership real estate is to be deemed in equity as changed into per-

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sonalty only to the extent necessary for the purposes of partnership equities; and its general character as realty continues with all the incidents of that species of property, between the partners themselves and also between a surviving partner and the representatives of a deceased partner, except that each share is impressed with an implied trust for the performance of partnership obligations.

APPEAL by the plaintiffs, Helen Huber and others, as executors, etc., of Otto Huber, deceased, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 17th day of November, 1903, refusing to vacate a prior order which granted a motion made by the respondent, the purchaser, at a foreclosure sale in the above-entitled action, to be relieved from his purchase.

Hugo Hirsh, for the appellants.

James P. Judge, for the respondent.

HIRSCHBERG, P. J.:

By the order appealed from the court refused to vacate a prior order granted in this action, by which the purchaser at a sale of real estate, had under a judgment of foreclosure, is relieved from his purchase, for the reason that the title to the premises is not regarded as good and marketable.

The property was conveyed by deed to Cornelius C. Poillon and Richard Poillon as tenants in common on April 4, 1870. Cornelius C. Poillon died on July 11, 1881, leaving a widow and five children, and leaving a will by which his executors were given a power of sale of his real and personal estate "either for cash, or part on bond and mortgage as they may in their discretion deem advisable." The will was admitted to probate July 28, 1881. By the terms of the will the executors were directed to divide the estate into three equal shares, to pay to the widow during life in lieu of dower the income of one of the shares, the principal of such share being devised and bequeathed upon her death to his children to be divided equally among them "the issue of any deceased child or children to take the share which his, her or their parent would have been entitled to if living."

On February 1, 1882, the widow of Cornelius C. Poillon, his then surviving children and the executors executed and delivered to Richard Poillon a deed which recites that "whereas the said Cornelius Poillon (lately deceased), and the said Richard Poillon party hereto of the fourth part were heretofore in the lifetime of the said Cornelius *seized as tenants in common* of the real estate hereinafter described with other property and the parties hereto have arranged a division of all said real estate held in common whereby the property hereinafter described belonged to the said party of the fourth part and the said party of the first part accepts the provision made for her by the will of said Cornelius Poillon, deceased, in lieu of her dower in his real estate;" and in consideration thereof and of the conveyance by Richard Poillon to the sons of the deceased of the shares in the real estate which had been set off to them in the division, grants and conveys to him the premises in question. Richard Poillon died on July 4, 1891, but the widow of Cornelius C. is still living.

The title of the purchaser would apparently depend upon the sufficiency of this deed to convey in fee the interest of the decedent and his heirs. It cannot be regarded as a proper exercise of the power of sale conferred by the will for no sale has taken place within the meaning and intent of that provision, and as a conveyance of the interests of the heirs it is subject to the obvious objection that it cannot dispose of the future rights of issue of the testator's children in whom interests may vest at the death of the widow after the death during her lifetime of their parent. The shares of the children, even if vested, are still subject to be divested on the contingency suggested. (*Lyons v. Ostrander*, 167 N. Y. 135.) The plaintiffs meet the objection by the assertion that the real estate in question is partnership property having been purchased with partnership funds by Cornelius C. Poillon and Richard Poillon as members of the firm of C. & R. Poillon, and consequently is to be treated as personal estate. This assertion was contained in an affidavit made by one of the executors of the deceased on the motion made by the purchaser to be relieved of his purchase, and after the order was made granting such relief formal declarations to the effect that the property was partnership property were executed, acknowledged and recorded by the surviving executor

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of Richard Poillon and the widow, executors and surviving children of Cornelius C. Poillon, and thereupon the motion to vacate the prior order was made which second motion resulted in the order appealed from.

In the absence of an agreement, express or implied, between the partners to the contrary, partnership real estate is to be deemed in equity as changed into personality only to the extent necessary for the purposes of partnership equities; and its general character as realty continues with all the incidents of that species of property, between the partners themselves and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with an implied trust for the performance of partnership obligations. (*Darrow v. Calkins*, 154 N. Y. 503.) Assuming, however, that the affidavit and declarations referred to tend to establish an "out and out" conversion of the realty into personality, there is no adjudication to that effect which would be binding upon a future claimant under the will of Cornelius C. Poillon. The declarations referred to would not be competent evidence against such claimant. (*Hutchins v. Hutchins*, 98 N. Y. 56; *Williams v. Williams*, 142 id. 156.) The purchaser or his grantees would be compelled to resort to parol proof in the defense of their title if assailed, and it is settled that when the title to real property depends upon questions of fact and resort must be had to parol evidence, a purchaser will not be compelled to perform his contract. (*Irving v. Campbell*, 121 N. Y. 353; *Holly v. Hirsch*, 135 id. 590; *Heller v. Cohen*, 154 id. 299.)

The order should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

JOSEPH W. KAY, Respondent, *v.* ROBERT GRIER MONROE, as Commissioner of Water Supply, Gas and Electricity of the City of New York, and Others, Appellants.

Patented article — action of New York city in inviting proposals therefor — when “a fair and reasonable opportunity for competition” is not afforded — injunction by a taxpayer.

The action of the authorities of the city of New York, when inviting bids for the furnishing of water meters for the use of that city, in limiting them to a certain type and size of meter in such a manner as to call for bids only upon a patented meter, under conditions calculated to practically exclude competition, constitutes a violation of section 1554 of the revised New York charter (Laws of 1901, chap. 466), which provides that “no patented article shall be advertised for, contracted for or purchased, except under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the board of estimate and apportionment.” A taxpayer, who brings an action to restrain the city authorities from carrying out a contract entered into pursuant to such bids, is entitled to an injunction *pendente lite*.

APPEAL by the defendants, Robert Grier Monroe, as commissioner of water supply, gas and electricity of the city of New York, and others, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 15th day of December, 1903, granting the plaintiff's motion for an injunction *pendente lite*.

Frederick St. John [T. Augustin Ledwith with him on the brief], for the appellants.

Joseph A. Burr, for the respondent.

HIRSCHBERG, P. J.:

The plaintiff, a taxpayer of the city of New York, seeks in this action to restrain the defendants other than the comptroller from carrying out a contract for the supply of water meters for the use of the city, and to restrain the defendant Edward M. Grout, as comptroller of said city, from certifying such contract. By the order appealed from a temporary injunction of the character indicated is continued during the pendency of the action.

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The papers before the court at Special Term tend to establish that in inviting bids for the furnishing of meters the defendant the commissioner of water supply, gas and electricity limited the bids with respect to the larger number of the meters advertised for to a certain type and size in such manner as to call for bids only upon a patented article under conditions which were calculated to practically exclude competition. Section 1554 of the revised New York charter (Laws of 1901, chap. 466), provides that "no patented article shall be advertised for, contracted for or purchased, except under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the board of estimate and apportionment." In construing this section of the revised charter in *Rose v. Low* (85 App. Div. 461) the Appellate Division in the first department recently held in substance that the intention of the provision was to prevent the purchase of a patented article except under conditions which would allow competition. In that case the proposed contract related to the paving of one of the city streets with a patented pavement, but the reasoning applies equally to the purchase of a patented article generally. The court said (p. 466): "We think what was intended was, that there should thereafter be no patented pavement laid, and no purchase of a patented article, except under conditions which would allow competition. That competition could not be a competition to supply the patented pavement or articles, because the manufacturers thereof have a monopoly of them by reason of their patents. If, however, a certain result was to be arrived at, namely, a smooth pavement to be laid, then there could be advertisement for a smooth pavement which would comply with the requirements deemed proper by the local authorities having charge of the particular street to be paved, and the owner of the patented pavement could compete with others who furnished a pavement which complied with the same requirements; and in that way the patentees of a pavement could enter into competition with others who would lay the same character of pavement, and conditions could thus be created where there could be a fair and reasonable opportunity for competition. * * * But when the conditions imposed by the board of estimate and apportionment are such that the only person who could lay the pavement is the patentee, it is apparent that the mandatory

provisions of the statute have not been observed, and that the municipal authorities are prohibited from laying a pavement contracted for under such conditions."

The order should be affirmed.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

In the Matter of the Appraisal of the Estate of WILLIAM H. HOOPLE,
Deceased, under the Transfer Tax Act.

COMPTROLLER OF THE STATE OF NEW YORK, Appellant; WILLIAM G. HOOPLE, as Executor, etc., of WILLIAM H. HOOPLE, Deceased, Respondent.

Transfer tax — refunding of money by the State Comptroller — when an application therefor is not barred by the Statute of Limitations — the Code provisions are not applicable — the reversal of the tax may be by the surrogate.

November 29, 1895, when the Transfer Tax Law (Laws of 1892, chap. 399) was in force, an executor paid, under the compulsion of an order of the Surrogate's Court, a transfer tax amounting to \$860 upon property which was exempt from taxation.

Section 6 of the Transfer Tax Law provided that it should be lawful for the State Comptroller, upon proof that any portion of a tax had been paid erroneously, to require it to be refunded, providing, however, that all applications for such refunding should be made within five years from the payment of the tax. This provision was incorporated, without change, in section 225 of the Tax Law (Laws of 1896, chap. 908) which revised the Transfer Tax Law.

In 1897, by chapter 284 of that year, section 225 of the Tax Law was amended so as to read as follows: "If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed, on due notice to the Comptroller of the State, the State Comptroller shall, by order, direct and allow the treasurer of the county, or the comptroller of the city of New York, to refund to the executor, administrator, trustee, person or persons, by whom such tax had been paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, * * *; but no application for such refund shall be made after one year from such reversal or modification."

By chapter 382 of the Laws of 1900, section 225 of the Tax Law was further amended so as to provide for the refunding by an order of the State Comptroller

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of transfer taxes erroneously paid, if the order was modified or reversed within two years from and after the date of the entry of the order fixing the tax.

Held, that an application by the executors, in October, 1903, for an order vacating the order fixing the transfer tax and directing the State Comptroller to refund the tax erroneously paid, was not barred by the Statute of Limitations; That the only limitation contained in section 225 of the Tax Law, as amended in 1897, related to the application to the Comptroller for the refunding of the tax after the order fixing the tax had been reversed or modified, and that it did not limit the time when the modification or reversal of the surrogate's order must be procured;

That the reversal or modification contemplated by the section, as amended in 1897, need not be by the action of an appellate tribunal, but might be made by the surrogate himself;

That section 225, as amended by the act of 1900 could not be given a retroactive effect, as, if the amendment should be deemed to create a Statute of Limitations, such construction would deprive of all redress those persons from whom payment of an illegal transfer tax had been forcibly exacted, who had delayed proceedings to procure the repayment of the same in reliance upon pre-existing legislation;

That the statutes of limitations prescribed by sections 380, 382 and 414 of the Code of Civil Procedure were not applicable to the remedies provided by section 225 of the Tax Law for procuring the repayment of a void tax;

That the Tax Law contains within itself all the limitations affecting the duty and liability of the State Comptroller to make restitution of transfer taxes illegally imposed.

APPEAL by the Comptroller of the State of New York from an order of the Surrogate's Court of the county of Queens, entered in said Surrogate's Court on the 29th day of October, 1903, which order vacated a previous order entered in said court on the 9th day of August, 1895, fixing a transfer tax upon United States government bonds under the Transfer Tax Law, and which further directed the State Comptroller to refund to the executor of the estate of William H. Hoople, deceased, the sum of \$660, being the amount paid by such executor in excess of the amount actually due as a transfer tax upon the estate of the said decedent.

Leonard B. Smith, for the appellant.

Joseph Rowan, for the respondent.

WILLARD BARTLETT, J.:

The tax of \$660 which the executor paid to the county treasurer of Queens county on November 29, 1895, under the compulsion of

an order of the Surrogate's Court made on the ninth day of August in the same year, was assessed upon bonds of the United States government which were exempt from taxation under the Transfer Tax Law of 1892 (Chap. 399), and the assessment was, therefore, illegal and void. (*Matter of Whiting*, 150 N. Y. 27; *Matter of Sherman*, 153 id. 1.) This is conceded by the respondent. The order under review, however, vacating the order taxing the United States bonds of the decedent was not applied for or made until October, 1903, nearly eight years after the tax had been paid, and the principal contention upon this appeal is that the executor's right to enforce a repayment as against the State Comptroller is barred by the lapse of time and the Statute of Limitations.

At the time when the tax in question was assessed and paid, the Transfer Tax Law then in force provided that it should be lawful for the State Comptroller, upon proof that any amount of said tax had been paid erroneously into the State treasury, to require the amount of the erroneous or illegal payment to be refunded to the person or persons who had paid such tax in error, provided that all applications for such refunding of erroneous taxes should be made within five years from the payment thereof. (Laws of 1892, chap. 399, § 6.) This provision was retained without change as a part of section 225 of the Tax Law when the Transfer Tax Law was revised and incorporated in the Tax Law in 1896. (Laws of 1896, chap. 908, § 225.) In 1897* section 225 of the Tax Law was amended so as to read as follows: "If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed, on due notice to the Comptroller of the State, the State Comptroller shall, by order, direct and allow the treasurer of the county, or the comptroller of the city of New York, to refund to the executor, administrator, trustee, person or persons, by whom such tax had been paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, * * * ; but no application for such refund shall be made after one year from such reversal or modification." It will be observed that the provision quoted contains no limitation as to

* See Laws of 1897, chap. 284.—[REP.]

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the time when the modification or reversal of the surrogate's order fixing the tax must be procured. The only limitation relates to the application to the Comptroller for a refund of the tax after the order of the surrogate shall have been reversed or modified. The reversal or modification contemplated by this statute need not be the action of an appellate tribunal. The modification may be made by the surrogate himself. (*Matter of Coogan*, 27 Misc. Rep. 563; affd. as *People ex rel. Coogan v. Morgan*, 45 App. Div. 628; affd., 162 N. Y. 613.)

In 1900 section 225 of the Tax Law was further amended so as to provide for the refunding by an order of the State Comptroller of taxes erroneously paid, if the order was modified or reversed within two years from and after the date of the entry of the order fixing the tax. (Laws of 1900, chap. 382.) The order fixing the tax in the case at bar was not modified within two years after its entry, and as I understand the argument in behalf of the State Comptroller on this appeal the contention is that the act of 1900 had the effect of absolutely denying any right to enforce the repayment of a void tax where the order assessing the same had been made more than two years before the passage of the act, and remained unreversed and unmodified. This it seems to me would be giving to the act of 1900 a retroactive effect, although the language of the statute does not indicate any intention on the part of the Legislature to do so. The five-year limitation prescribed by the Transfer Tax Law of 1892 had not run when the act of 1897 took effect. The only limitation contained in the act of 1897, as has already been pointed out, related to the lapse of time after the order fixing the tax had been reversed or modified. It did not undertake to limit the time within which a party who had paid a void tax might apply to the Surrogate's Court for a modification of the order assessing it. Nothing had occurred, therefore, to bar the right of the executor in this case to apply to the surrogate for a modification of such original order at the time of the passage of the act of 1900. I do not think that the latter statute was intended to be retroactive, or to have the effect as it would have if so construed, to cut off all rights of the executor in this case immediately upon its enactment. The rule may be considered settled in this State that neither original statutes nor amendments have any retroactive force unless the Legislature so declares,

either in express words or by unmistakable implication. "Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past." (*White v. United States*, 191 U. S. 545, 552; *Matter of Miller*, 110 N. Y. 216; *People ex rel. Collins v. Spicer*, 99 id. 225.) The doctrine which has sometimes been laid down that express words are necessary to give a statute a retroactive effect has been declared not to apply to remedial statutes, provided they do not impair contracts or disturb absolute vested rights (*People ex rel. Collins v. Spicer, supra*, 233); and it has been held that Statutes of Limitation may act retrospectively unless they absolutely destroy rights of action or impair them to an unreasonable extent. (*Fiske v. Briggs*, 6 R. I. 557; *Burwell v. Tullis*, 12 Minn. 572.) But even under this liberal rule no retrospective effect can be given to chapter 382 of the Laws of 1900, amending section 225 of the Tax Law, for if the amendment be deemed a Statute of Limitation, such a construction would absolutely and most unreasonably deprive of all redress those persons from whom payment of an illegal transfer tax had been forcibly exacted but who had delayed proceedings to procure the repayment of the same in reliance upon pre-existing legislation.

Assuming that prior to November 29, 1901 (six years after the payment of the tax), the respondent was entitled to enforce a demand for repayment against the State Comptroller, the appellant argues that upon the expiration of the six years the limitations prescribed by sections 380, 382 and 414 of the Code of Civil Procedure became applicable, and constituted a bar to the enforcement of the executor's claim. It does not seem to me, however, that the Code provisions cited have any bearing upon such an order as that hereunder review. In terms they could be available to the State Comptroller only in an action or special proceeding directly against him; but in my opinion they have no application to the remedies provided by the Tax Law for procuring the repayment of a void tax. It seems to me that the intention of the Legislature has been distinctly manifested in the various enactments on the subject to put into the tax laws themselves all the limitations affecting the duty and liability of the State Comptroller to make restitution of moneys

which the representatives of estates of decedents have been compelled to pay into the State treasury without authority of law.

For these reasons I think that the order of the Surrogate's Court was right and should be affirmed.

All concurred.

Order of the Surrogate's Court of Queens county affirmed, with ten dollars costs and disbursements.

BRUNO HAACK, an Infant, by LAURA A. HAACK, his Guardian ad Litem, Appellant, v. THE BROOKLYN LABOR LYCEUM ASSOCIATION, Respondent, Impleaded with JOSEPH HEILIG and THE CITY OF NEW YORK.

Negligence—failure after a fire to take down a wall adjoining a passageway—liability of the owner of the land to one injured by its fall.

In an action brought to recover damages for personal injuries it appeared that the defendant was the owner of a lot upon which there were two buildings, the rear building being sixty-five feet from the street. Access to the rear building was afforded by an alleyway located wholly upon the owner's premises and adjacent to the east wall of the front building.

On December 20, 1900, the front building was practically destroyed by fire. After the fire the owner conducted a liquor saloon for the accommodation of the public generally in the rear building, access to the saloon being obtained by passing through the alleyway.

January 30, 1901, the plaintiff, a boy under twelve years of age, went into the alleyway for the purpose of picking up some tickets which were lying on the ground. While in the alley, about fifteen feet from the street, he was struck and injured in consequence of the falling of a portion of the eastern wall of the front building, which had been in a dangerous condition since the time of the fire.

Held, that the defendant having invited the public to make use of the alleyway for the purpose of obtaining access to the saloon, a person lawfully in such alleyway was entitled to the same protection against injury from dangerous structures adjacent to the alley as he would have been had the alley been a public highway;

That the question whether the defendant had properly discharged the duty which it owed to the plaintiff was one of fact for the jury, and that it was improper for the court to dismiss the plaintiff's complaint;

That where the life of a building has been destroyed by fire and the walls are no longer used in supporting it, but constitute merely a part of the ruins of the building, it is not a reasonable and proper use of the property to permit the walls to remain standing after the expiration of a reasonable time for investigation and for their removal.

APPEAL by the plaintiff, Bruno Haack, an infant, by Laura A. Haack, his guardian ad litem, from a judgment of the Supreme Court in favor of certain of the defendants, entered in the office of the clerk of the county of Kings on the 17th day of March, 1903, upon the dismissal of the complaint by direction of the court as to the defendants The Brooklyn Labor Lyceum Association and Joseph Heilig after a trial at the Kings County Trial Term, the complaint having been previously dismissed as to the defendant the City of New York.

James C. Cropsey [F. W. Catlin with him on the brief], for the appellant.

Edward S. Seidman [Alfred D. Senftner with him on the brief], for the respondent.

WILLARD BARTLETT, J.:

In this action the plaintiff, who at the time of the accident was under twelve years of age, sought to recover against the Brooklyn Labor Lyceum Association, Joseph Heilig and the city of New York, damages on account of injuries sustained by him in consequence of the fall of a wall of a building belonging to the first-named defendant, which had been partially destroyed by fire. The defendant Joseph Heilig was a contractor employed by the owner to take down and remove that portion of the building which remained after the fire. The complaint charged him with negligence in failing to support and protect the walls while he was at work, and alleged negligence on the part of the city of New York in permitting the walls and other portions of the building to remain for a long time in a dangerous condition. In this court, however, the learned counsel for the plaintiff does not insist upon the right of his client to enforce any liability against either the contractor or the city; and he expressly states in his brief that this appeal is prosecuted only against the Brooklyn Labor Lyceum Association. The only question which we have to consider, therefore, is whether

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the plaintiff upon the trial made out a case which entitled him to go to the jury as against the owner of the building by the fall of which he was injured.

The structure which was burned was known as the Lyceum Building. It was situated on Willoughby avenue, between Charles place and Evergreen avenue, in the borough of Brooklyn. Upon a lot immediately adjoining this building in the rear, sixty-five feet from the street, was another structure known as the Gymnasium Building. On December 20, 1900, the Lyceum Building was practically destroyed by fire, but after the fire a portion of the east wall, two or three stories high, remained standing, which bulged out over the lot in such a manner as to indicate that it was dangerous and likely to fall. It remained in this condition from the date of the fire until the 30th day of January, 1901, when the accident occurred. A liquor saloon was maintained by the association in the Lyceum Building prior to the fire. After the fire, according to the testimony of the manager of the corporation, the Brooklyn Labor Lyceum Association "ran the saloon" in the Gymnasium Building, under the same license. "We got going," says the witness, "as soon as we could after the fire. That was a public saloon; anybody could come in and get a drink that paid for it." This saloon was not accessible directly from the street, but access thereto was obtained by passing through an alleyway wholly upon the property of the association. The wall which fell stood on the side of this alleyway. There were no barriers there at the time of the accident, and no danger signs until afterward.

The plaintiff, while passing along Willoughby avenue in the vicinity on his return from an errand upon which he had been sent by his mother, had his attention attracted to the alleyway by seeing some boys there who were picking up tickets on the ground. He ascertained from them what they were doing, and then went into the alley himself to pick up some of the tickets, and while there was struck and injured by the falling of the wall. According to his narrative of the occurrence he saw no sign of any danger, no one ordered him out, he had been in the alley only two or three minutes when the wall fell upon him, and the place of the accident was only about fifteen feet from the public street.

It is sufficiently evident from the proof in regard to the mainte-

nance of the saloon by the respondent in the Gymnasium Building that the association held out an invitation to the public to make use of the alleyway for the purpose of access to the saloon. Although the alley was a private property of the association, its use by the owner was such as to indicate to the public generally, including the plaintiff, that it was a place which they might enter or pass through for any lawful purpose without becoming trespassers. This being the situation, what was the obligation of the owner of the premises in reference to protecting such persons entering the alley from injury by reason of the dangerous wall standing thereon? It has been held that a building adjoining a highway, which is in such a condition as to endanger the safety of persons passing along it, is a nuisance. (*Vincett v. Cook*, 4 Hun, 318.) "The law casts upon the owners of buildings so situated," said GILBERT, J., in the case cited, "the duty of preventing their being or becoming dangerous to persons lawfully passing along the highway. Failure in such duty, and resulting damage, furnish *prima facie* evidence of negligence by the maxim *res ipsa loquitur*." Although this alley was not a highway, it was, it seems to me, a place where any lawful visitor was entitled to the same degree of protection as he would have been upon a highway, against injury from dangerous buildings adjacent thereto. The owner and occupant of premises on which there is an open way between a public street and a public saloon on such premises, to which all are invited, owes the duty to any person lawfully coming upon said premises, along such open way, to take reasonable care to prevent such person from being injured by a dangerous structure standing thereon and liable to fall. Such seems to me to be the reasonable rule deducible from the general principles of the law of negligence as applicable to the owners of real property. Where the life of a building has been destroyed by fire and the walls are no longer used in supporting it, but such wall constitutes merely a part of the ruins of the building, to maintain it after the expiration of a reasonable time for investigation and for its removal is not a reasonable and proper use of one's property. (*Ainsworth v. Lakin*, 180 Mass. 397.) A failure on the part of the owner to remove a wall of this character is still less reasonable or proper when its dangerous condition is known or ought to be known to the owner, unless he takes reasonable precautions to give warning of

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the existence of the danger to persons coming into the vicinity at his invitation, express or implied.

I think there was enough to go to the jury on the question whether the respondent association discharged the duty of care which it owed the plaintiff, and that it was error to dismiss the complaint as against this defendant. It does not seem to me that the case of *Walsh v. Fitchburg R. R. Co.* (145 N. Y. 301), which was a turntable case, is an authority against the plaintiff's position; for even there it was held that the defendant owed the injured lad the duty to abstain from injuring him by failing to exercise reasonable care. The Court of Appeals merely denied that the railroad company owed the plaintiff the duty of active vigilance to see that he was not injured while upon its land. There is no suggestion in the present case that the respondent was bound to be actively vigilant to protect the plaintiff, but the claim is that it failed to exercise reasonable care in that regard, and I think there is proof in the record upon which the jury might have found such to be the fact, although of course they were not bound to do so. Neither does the case of *Engel v. Eureka Club* (137 N. Y. 100) lay down any rule of law the application of which would exonerate this respondent from liability. There the owner of a building entered into a contract with a competent builder to take down a wall, and in consequence of negligence on the part of the contractor in taking down the wall, it fell and killed the plaintiff's intestate. Under these circumstances the court held that the contractor and not the owner was liable. In the case at bar, however, the accident was not attributable in any manner to the action of Heilig, the contractor, in dealing with the burned building, for he himself testified that he was not pulling down that wall when the accident happened, and had not started to pull it down and had not touched it or done any work at all upon it.

If the foregoing views are correct, they require a reversal of the judgment.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

PATRICK B. MC SWEENEY and MARY E. GRACEY, as Administrators, etc., of THOMAS MC SWEENEY, Deceased, Appellants, v. ERIE RAILROAD COMPANY, Respondent.

Negligence — death on a railroad crossing — failure of a stationary signal bell to ring — failure to show that the deceased looked or listened for the train — what proof is required of freedom from contributory negligence.

In an action brought to recover damages resulting from the death of the plaintiffs' intestate, it appeared that while the intestate, accompanied by a lady, was driving across the defendant's railroad tracks in a buggy on an August afternoon, the buggy was struck by one of the defendant's trains and the intestate and his companion were killed.

The accident occurred during a heavy rain storm, accompanied by thunder and lightning, and the top of the buggy was up and the side curtains drawn. There was a stationary signal bell at the crossing which was designed to ring when an approaching train was 1,300 feet distant, but this signal bell was out of order at the time of the accident. The train was running at the rate of fifty or sixty miles an hour and no signal of its approach was given.

At one point in the highway the intestate could have seen the train approaching when it was 626 feet from the center of the crossing. The next point at which the train became visible was 28 feet from the crossing, when it could have been seen for a distance of 106 feet. The only evidence as to the conduct of the occupants of the buggy when approaching the track was that the speed of the horse was decreased from a trot to a walk, and that it was walking at the time of the accident.

Held, that the complaint was properly dismissed, as the plaintiffs had not, either by direct evidence or by inference fairly deducible from the facts proved, shown that the intestate was free from contributory negligence:

That it was incumbent upon the intestate, under the circumstances, to look and listen for an approaching train, and that the mere fact that the stationary signal bell was not ringing did not relieve him from the imputation of contributory negligence if he failed to exercise this degree of care;

That while the absence of contributory negligence need not be established by direct evidence, but may rest upon inferences properly drawn from the surrounding facts and circumstances, an inference of due care cannot be based solely upon the presumption that a person whose life is exposed to danger will adopt proper means to protect himself.

APPEAL by the plaintiffs, Patrick B. McSweeney and another, as administrators, etc., of Thomas McSweeney, deceased, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Orange on the 4th day of June, 1903, upon the dismissal of the complaint by direction of the

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court after a trial at the Orange Trial Term, and also from an order entered in said clerk's office on the 20th day of June, 1903, denying the plaintiffs' motion for a new trial made upon the minutes.

Claude Gignoux [Thomas Watts with him on the brief], for the appellants.

Henry Bacon, for the respondent.

WILLARD BARTLETT, J.:

The plaintiffs' intestate was killed by one of the defendant's trains while endeavoring to cross the Erie railroad at Otisville, in Orange county, at about quarter past five o'clock on the afternoon of August 28, 1902. He was in a buggy drawn by a single horse, and was accompanied by a lady who was also killed. The evidence does not disclose who was driving. A heavy rainstorm, accompanied by thunder and lightning, had prevailed during the afternoon and was not yet over, although its violence had somewhat abated at the time of the accident. The top of the buggy was up and the side curtains were drawn down. The train which collided with the buggy was bound east and was running at a rate of from fifty to sixty miles an hour. There is a descent of 15 feet on the road along which the deceased approached the crossing between a point 235 feet distant from the railroad and the railroad tracks. Ten feet of this descent is within 150 feet of the railroad.

Near the point where the accident occurred, which is known as Cadwell's Crossing, the defendant before and at the time of the accident maintained a stationary signal bell which, when it operated properly, would ring upon the approach of a train when the train was about 1,300 feet distant. This signal appears to have been out of order on the day when the plaintiff's intestate was killed and failed to ring upon the approach of the train which struck the buggy. There was abundant other evidence from which a jury might have found that no warning whatever was given of the train's approach; and if the dismissal of the complaint was based solely upon the proposition that there was no proof of the defendant's negligence, I do not see how it could be sustained.

On the other hand, a careful reading of the record compels the conclusion that the plaintiffs failed to show that their intestate was

free from contributory negligence on his part, either by direct evidence or by inferences fairly deducible from the facts proven. The only witness who testifies to having seen the buggy prior to the very moment of the collision was one Joseph B. Conklin, who was in a house upon the roadway down which the deceased was driving. The material parts of his testimony are as follows: "At the time of the accident I saw this carriage coming down the street. I did not see anything except that I saw the carriage coming down and the train strike it. The horse was walking at the time it was struck. * * * There had been a very fine coaching parade and then a very heavy thunder storm. The storm was still raging when this accident occurred. It was a very unusual storm, it had been, was somewhat better. * * * William De Witt was with me at the time I noticed this horse and wagon. He called my attention to it by some remark that these people would get caught if they did not look out. I would not have noticed them if he had not called my attention to them. For some reason I understood that he was apprehensive that they would be struck by the train and I began to look at them. That was perhaps 150 feet from the track when I first noticed them, at the top of the hill about. From that point on I watched them until the crash came, until they were struck. In going that distance they did not stop at any point from that 150 feet where I first noticed them until the collision. I am not so positive that they continued on at the same gait they were moving when I first noticed them, they might have been going slower; I think probably when I first noticed them they were trotting. Mr. Bacon: You think they were walking when they went over? The witness: Yes, sir. He did not stop at any point from the 150 feet until the point of collision, he did not stop in my sight; I was watching them all the while. * * * It was a top buggy. I think with the side curtains on."

There was also evidence that at a point on the highway over which the deceased was approaching he could have seen a train coming from the direction of the train which struck him when such a train was 626 feet from the center of the crossing. The next point at which the train would become visible was 23 feet from the crossing, when it could have been seen at a distance of 106 feet.

From the testimony which has been quoted, it will be observed

that there is no evidence whatever of the exercise of any degree of care on the part of the persons in the buggy, unless it is to be found in the statement that the gait of the horse was decreased from a trot to a walk as the buggy approached the track. Mr. Conklin does not say that he saw either of the occupants of the vehicle, so that we are left wholly in the dark as to what they actually did, except to reduce the speed of the horse. The exercise of due care required the deceased, under the circumstances, to look and listen for an approaching train, and the mere fact that the stationary signal bell was not ringing did not relieve him of the imputation of negligence if he failed to exercise this degree of care. (*Rodrian v. N. Y., N. H. & H. R. R. Co.*, 125 N. Y. 526.) "In case of a death accident at a railroad crossing," says ANDREWS, J., in the case cited, "it must often happen that the circumstances immediately preceding it and the acts and conduct of the deceased are left in great obscurity. But the rules of law governing the right of recovery are the same as in other cases, although slighter evidence of compliance with the duty cast upon a plaintiff might be deemed sufficient than where the injured person was alive and competent to testify."

While the absence of contributory negligence need not be established by direct evidence, but may rest upon inferences properly drawn from the surrounding facts and circumstances, an inference of due care cannot be based solely upon the presumption that the person whose life is exposed to danger will adopt proper means to protect himself. Such is the established rule in this State. (*Wiwirovski v. L. S. & M. S. R. Co.*, 124 N. Y. 420.) A different rule prevails in the Federal courts. (See *Baltimore & Potomac R. R. v. Landrigan*, 191 U. S. 461.)

In the present case, unless we are prepared to say that the mere change in the gait of the horse from a trot to a walk as the buggy approached the crossing warrants the inference that the deceased looked and listened for the approaching train, it is manifest that the plaintiffs failed to sustain the burden which the law put upon them of establishing freedom from contributory negligence on the part of the deceased. In my opinion, the fact proved does not justify the inference necessary to make out the plaintiffs' cause of action. A momentary halt within twenty-three feet of the track, or a glance

when the buggy reached that spot in the direction from which the train was approaching would have averted the accident. To my mind, the evidence indicates that the occupants of the buggy drove onto the crossing confident in their safety, because of the silence of the stationary signal bell, and without the observance of that care which the law imposed upon them, notwithstanding the omission of the signal.

For these reasons I think the judgment should be affirmed.

Judgment and order unanimously affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ABEL CROOK, as Sole Acting Executor, etc., of WILLIAM A. STUART, Deceased, and THE BROOKLYN MASONIC GUILD, a Corporation Duly Organized under the Laws of the State of New York, the Residuary Legatee under Said Will, Respondents, v. JAMES L. WELLS, President, and Others, Commissioners of Taxes and Assessments, Constituting the Board of Taxes and Assessments of the City of New York, Appellants.

The Brooklyn Masonic Guild is not exempt from taxation — a legacy to a corporation exempt from taxation is subject to tax while in the hands of the executor — an assessment against an "executor and trustee" is valid against the executor where the will creates no trust.

The act incorporating the Brooklyn Masonic Guild provides, "the said corporation is formed and hereby authorized to acquire, construct, maintain and manage a hall, temple, or other building within the borough of Brooklyn, New York city, for the use of masonic bodies and other fraternal associations and benevolent organizations, and for social, benevolent and charitable purposes, and generally to promote and cherish the spirit of brotherhood among the members thereof."

The act also gives the corporation the powers and subjects it to the liabilities given and imposed by the General Corporation Law (Laws of 1892, chap. 687, as amd.) so far as the same are not inconsistent with the act of incorporation. Subdivision 7 of section 4 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1897, chap. 371) provides: "The real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or

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animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation," and that "no such corporation or association shall be entitled to any such exemption if any officer, member or employe thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes."

Held, that the corporation did not come within subdivision 7 of section 4 of the Tax Law, as, under its charter, it might use its property for other purposes than those mentioned in the subdivision, and for the further reason that it did not appear that the association might not lawfully give to its officers, members or employees the pecuniary profit prohibited by said subdivision;

That a statement that "no officer, member or employee thereof receives or is entitled to receive any pecuniary profit from the operations thereof," did not bring the case within that portion of subdivision 7 providing that such persons should not be "lawfully entitled to receive" any such profits.

Under section 2721 of the Code of Civil Procedure, providing that an executor shall retain the testator's personal property in his hands for the period of one year from the time when the letters testamentary were granted, and section 8 of the Tax Law providing: "Every person shall be taxed in the tax district where he resides when the assessment for taxation is made, for all personal property owned by him or under his control as agent, trustee, guardian, executor or administrator," an executor, during such year, is taxable upon the testator's personal property in his hands, although such personal property has been bequeathed by the will to a corporation whose personal property is exempt from taxation.

The fact that the assessment is in form against the "executor and trustee," and that the will, although it referred to the testator's appointees as "executors and trustees," did not, in fact, create a trust, does not invalidate the assessment, particularly where this objection is urged only as to a portion of the assessment.

APPEAL by the defendants, James L. Wells, president, and others, commissioners of taxes and assessments, constituting the board of taxes and assessments of the city of New York, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 27th day of November, 1903, denying the defendant's motion to quash or supersede a writ of certiorari theretofore issued to review the assessment of the personal estate of William A. Stuart, deceased.

George S. Coleinan [E. Crosby Kindleberger with him on the brief], for the appellants.

Samuel Crook, for the respondents.

WOODWARD, J.:

William A. Stuart died September 30, 1902, leaving a last will and testament, in which he disposed of a personal estate appraised at \$201,382.36. His will was admitted to probate in the county of Kings on the 9th day of February, 1903, letters testamentary being granted to Abel Crook on the same day, Mr. Crook previously and on the 23d day of October, 1902, having been appointed temporary administrator. In 1903 the personal estate of the deceased, in the hands of Mr. Crook, was assessed in the sum of \$200,000. Thereafter Mr. Crook as executor, and on behalf of the Brooklyn Masonic Guild, residuary legatee under the will of Mr. Stuart, made application to the board of taxes and assessments to have the assessment corrected, the theory being that under the will the entire residuary estate of Mr. Stuart vested in the Brooklyn Masonic Guild as of the date of Mr. Stuart's death, and that under the provisions of the Tax Law (Laws of 1896, chap. 908, § 4, subd. 7, as amd. by Laws of 1897, chap. 371) the personal property of the said Brooklyn Masonic Guild, organized exclusively for charitable and benevolent purposes, was exempt from taxation; that when the legacy vested in that corporation it became the owner thereof, and only the beneficial enjoyment of the fund was postponed to a future date; that under those circumstances the holding of the entire property of the estate by Mr. Crook, on the second Monday of January, in his representative character, did not render taxable that portion of the fund which the Brooklyn Masonic Guild was entitled to receive under the terms of Mr. Stuart's will, this sum aggregating, after the payment of the debts and specific legacies, \$85,540.05. Upon this application the board of taxes and assessments made a reduction of \$47,342.31 on account of certain stocks exempt from taxation, and fixed the assessment at \$154,000. The relators obtained a writ of certiorari to review the assessment, and the respondents made a motion to quash or supersede the writ upon the ground that it appeared on the face of the petition that neither of the relators had been or would be aggrieved by the assessment complained of. The court at Special Term denied the motion, and by its order reduced the assessment to the sum of \$68,500, holding that the "residuary estate and personal property belonging to the fraternal and charitable corporation, the Brooklyn Masonic Guild, is

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exempt from taxation." The relators do not appeal from the order fixing the amount of the assessment at \$68,500, and by acquiescing in a part of the assessment they are hardly in a position to urge, in support of the order, that the assessment was void because of a technical irregularity in the designation of Mr. Crook as "executor and trustee," there being in fact no trust created. Every executor is a trustee; the will refers to the appointees of the testator as "executors and trustees," and we are of opinion that there is no merit in this objection to the form of the assessment, particularly as the relators do not urge this objection against a portion of the assessment, as fixed by the court. The defendants appeal from the order, and present the question of law whether personal property held by an executor, which would be liable to assessment for taxation if bequeathed to an individual, is exempt from taxation if bequeathed to a benevolent or charitable corporation.

It might be questioned, in passing, whether the petition sets out facts sufficient to show that the Brooklyn Masonic Guild is entitled to the exemption claimed under any circumstances. Subdivision 7 of section 4 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1897, chap. 371) provides that "the real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation." A copy of the act incorporating the Brooklyn Masonic Guild is made a part of the moving papers, and this act provides that "the said corporation is formed and hereby authorized to acquire, construct, maintain and manage a hall, temple, or other building within the borough of Brooklyn, New York city, for the use of masonic bodies and other fraternal associations and benevolent organizations, and for social, benevolent and charitable purposes, and generally to promote and cherish the spirit of brotherhood among the members thereof." (Laws of 1902, chap. 481, § 1.) And by the provisions of section 6 of this act the corporation is given the powers and made subject to

the liabilities of the General Corporation Law, so far as the same are not inconsistent with the act. By section 11 of the General Corporation Law (Laws of 1892, chap. 687, as amd. by Laws of 1895, chap. 672), corporations are given very broad general powers, particularly in subdivision 5, and we find nothing in the act which limits the Brooklyn Masonic Guild exclusively to the purposes prescribed by the statute as a condition of exemption from taxation. That the Legislature intended to limit the scope of the exemption strictly is evidenced by the further provision of subdivision 7 of section 4 of the Tax Law (as amd. *supra*), that "no such corporation or association shall be entitled to any such exemption if any officer, member or employe thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof, for any such avowed purposes, be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association, or for any of its members or employes, or if it be not in good faith organized or conducted exclusively for one or more of such purposes." Under the charter this building to be erected by the Brooklyn Masonic Guild is not to be used exclusively for the purposes set forth in subdivision 7 of section 4 of the Tax Law (as amd. *supra*), but it may be used by "masonic bodies and other fraternal associations," and "for social, benevolent and charitable purposes." It may, in the discretion of the board of directors, so far as the provisions of the statute regulate the matter, be used entirely for social purposes, for dances, receptions, etc.; it may be used by the Benevolent Order of Elks or the Catholic Mutual Benefit Association or any one of the hundreds of such orders for lodge purposes and social functions, while the law requires, as a condition of tax exemptions, that the corporation shall be "organized exclusively" for the purposes enumerated in the statute, and that it shall be "used exclusively for carrying out thereupon one or more of such purposes," and among these purposes there is no mention of fraternal associations or social functions of any kind. It is true that the petition alleges that "no officer, member or employee thereof receives or is entitled to receive

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any pecuniary profit from the operations thereof," but the statute requires that they shall not be "lawfully entitled to receive" any such profit, and it can hardly be said that under the provisions of the charter of the Brooklyn Masonic Guild such a profit might not be lawfully given to the association or its officers, members or employees.

But assuming that the Brooklyn Masonic Guild, with a charter broad enough to permit it to give or rent its building to an athletic association, is entitled to exemptions upon its personal property, is there any justification for holding that it is entitled to such exemption upon a legacy which is still lawfully in the hands of the executor of the decedent's estate? Section 3 of the Tax Law provides that "all real property within this State, and all personal property situated or owned within this State, is taxable unless exempt from taxation by law." Personal property situated or owned within the State is subject to taxation, unless it can be shown that the particular property is exempt, and by the provisions of section 8 of the Tax Law "every person shall be taxed in the tax district where he resides when the assessment for taxation is made, for all personal property owned by him or under his control as agent, trustee, guardian, executor or administrator." There is no question that Mr. Crook had lawfully in his possession at the time of making the assessment in question \$154,000 worth of personal property which was subject to taxation in this State; it was property on which the decedent would have been liable to pay taxes had he been living, and the law retaining this property in the hands of the executor for a period of one year from the time of granting letters testamentary (Code Civ. Proc. § 2721), no reason suggests itself why section 8 of the Tax Law requiring an assessment on "all personal property owned by him, or under his control as agent, trustee, guardian, executor or administrator," should not be given effect. It is true, as suggested in some of the adjudicated cases, that the provision of section 2721 of the Code of Civil Procedure that no legacy shall be paid by an executor until after the expiration of one year is a mere rule of convenience, and does not determine the time of vesting of a legacy; but it is equally true that the State has a perfect right to determine the terms upon which property may be transferred, and it has an undoubted right to determine at

what time the State will relinquish its right to tax any kind of property.

Personal property owned by the individual, and not specially exempt, is subject to taxation. When that individual dies and leaves property to be distributed under a will, the State provides that it shall remain in the possession of the executor or administrator for a period of one year, and it requires that such property under the control of an executor or administrator shall be subject to taxation, the same as though the testator had remained alive. When the period of administration is at an end; when the property has been lawfully transferred to those who have been designated as beneficiaries under the will, it becomes subject to the law governing such property. If it goes into the hands of a corporation which is entitled to exemptions, it becomes exempt; if into the hands of an individual or corporation not entitled to exemptions, then it must continue to share in the public burdens, but during the time that the law holds the fund in the custody of the executor or administrator it is entitled to no exemptions. The title to the property may vest at the time of the testator's death; it undoubtedly does, but so long as it is lawfully in the control of the executor or administrator it is subject to the provisions of sections 8 and 32 of the Tax Law, and must continue to bear the burdens to which it was subject as the property of the testator. This is the clear and unambiguous language of the law, which should not be strained in construction for the purpose of relieving beneficiaries of that measure of burden which all property, in the absence of special considerations of a public nature, should properly bear. The testator not having directed that the fund be paid over in a shorter time than that prescribed by section 2721 of the Code of Civil Procedure, while the rights of the beneficiary became fixed as of the time of the testator's death, that right was only to have the property delivered at the end of one year, and in the meantime the Tax Law provided that it should continue as taxable property in the hands of the executor. This is eminently fair and just; it is a legitimate condition imposed by the State upon property in the course of administration, and beneficiaries ought to be the last persons to object to the payment of an equal portion of the public burdens. We think nothing in the statutes as they appear to-day take this case out of

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the rule laid down in the case of *People v. Assessors of Albany* (40 N. Y. 154).

The order appealed from should be reversed and the motion to quash the writ of certiorari should be granted.

All concurred; HIRSCHBERG, P. J., in result.

Order reversed, with ten dollars costs and disbursements, and motion to quash writ of certiorari granted, with ten dollars costs.

Louis B. PRAHAR, Appellant, v. Rosalie TOUSEY, as Executrix, etc., of Frank TOUSEY, Deceased, Respondent.

Fraudulent representations to induce a tenant to rent property for a printing establishment — what proof does not establish their existence — statements made without knowledge whether they are true or not — rule of caveat emptor applied to a lessee — when a tenant may vacate the demised premises under the statute.

Where a party, for the purpose of inducing another to contract with him, states, on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false and without having reasonable grounds to believe it to be true, he is liable in fraud, if the statement is relied on and is subsequently found to be false.

The lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor covering that subject. The tenant hires at his peril. A rule similar to that of *caveat emptor* applies and throws on the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects.

Chapter 845 of the Laws of 1860, which is now incorporated in the Real Property Law (Laws of 1896, chap. 547, § 197), authorizing a tenant to vacate the demised premises under certain circumstances, does not apply to a case where the defect on account of which the tenant vacates the premises existed when the lease was made and no fraud or misrepresentation is shown on the part of the landlord, or when it results from the neglect of the tenant to make ordinary repairs, or from deterioration due to the ordinary use by the tenant.

A tenant, who hired premises for use as a printing establishment, removed therefrom prior to the expiration of the term owing to the fact that the public authorities of the city in which the leased building was located limited the speed of the printing presses upon the ground that the vibration, engendered when the presses were operated at full speed, endangered the building.

The lessor then brought an action against the lessee to recover rent under the lease. The lessee interposed an answer alleging that he was induced to enter

into the lease by the fraudulent representations of the lessor to him that the building was adequate for the use to which he intended to devote it.

Held, after a consideration of the evidence adduced at the trial, that a verdict rendered against the lessor on the issues of fraud was not supported by the evidence.

APPEAL by the plaintiff, Louis B. Prahar, from a judgment of the Supreme Court, nominally in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 30th day of July, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 24th day of June, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

John E. Brodsky, for the appellant.

James M. Hunt, for the respondent.

WOODWARD, J.:

On the 11th day of December, 1900, the plaintiff as the owner of a factory building at 124 to 130 Pearl street, borough of Brooklyn, entered into a written contract with the defendant's husband, Frank Tousey, by the provisions of which the plaintiff leased to the said Frank Tousey certain floors of the factory building, to be used as a printing office, for a period of five years from the 1st day of February, 1901. Mr. Tousey began moving his printing office in January, 1901, and was fully installed and had been operating his plant for several weeks before the close of the month of February, at which time, by order of the department of buildings, he was compelled to stop running his presses, this order being subsequently modified so that a portion of the presses were permitted to run, some of them at a reduced rate of speed. Matters remained in this situation for about one year when Mr. Tousey, having in the meantime constructed a building of his own, removed from the plaintiff's premises. Mr. Tousey subsequently died, and this action is brought against his executrix to recover the rent due under the terms of the lease for the months of February, 1902, to and including March, 1903. The answer alleges fraud in the inception of the lease contract and the verdict of the jury allows the plaintiff \$194, this being evidently for a portion of the month of February, 1902, which it was conceded had not been paid for, though occupied by Mr. Tousey. This verdict, while nominally for the plaintiff, is in effect in favor of the defendant's theory of fraud in the making and

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delivery of the contract, and the question has been properly raised whether there was evidence which entitled the defendant to go to the jury upon the question of fraud, and this is the broad question presented by the plaintiff's appeal from the judgment and from the order denying plaintiff's motion for a new trial upon the minutes.

The amount claimed in this action, something over \$8,000, with the unexpired term to be governed by the decision in this case, involving about \$28,000, which fact was called to the attention of the jury by the learned justice presiding at the trial, appeals strongly to the abstract sense of justice, under the facts appearing in this case, and renders necessary a careful examination of the evidence. It is important to bear in mind that while it seems hard to impose a burden of \$28,000 upon Mr. Tousey's estate, for which there can be only a partial return, under the duty of the landlord to make the loss as small as may be within reasonable limitations, there are important considerations of public policy to be borne in mind in adjudications of this character. The gravamen of the defense is fraud; fraud is, in its essential elements, a crime, and we ought not lightly to convict a man of fraud for the purpose of relieving others of the obligations which they have voluntarily assumed in their contracts. The law surrounds contracts with special protections against interference even by the sovereign power, and it is of the greatest importance that the mutual and lawful obligations of persons qualified to enter into contracts should be observed, and that they should be construed and the law administered within well-defined rules, "not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough." (*Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 109, quoting Cooley Const. Lim. [5th ed.] 484, 485.)

It is uniformly held in this State that the lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor covering that subject. The tenant hires at his peril, and a rule similar to that of *caveat emptor* applies and throws on the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects. (*Franklin v. Brown*, 118 N. Y. 110, 115.) The same case cites, apparently with approval, *O'Brien v. Capwell* (59 Barb. 497, 504), to the effect that "as between landlord and tenant,

* * * when there is no fraud or false representations or deceit, and in the absence of an express warranty or covenant to repair, that there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use." (See *Daly v. Wise*, 132 N. Y. 306.) The learned justice presiding, in harmony with this rule, charged the jury that as the lease contained no covenants in respect to the condition or adaptability of the premises, they could not find for the defendant upon anything contained in the contract, but submitted to them the question whether there was fraud in the negotiations looking to the execution and delivery of the lease, and the question presented is whether the evidence justifies such a submission.

The defendant's theory, as set forth in her answer, was that Frank Tousey was engaged in operating a printing establishment in the borough of Manhattan; that he was obliged to use heavy presses, to be operated at a high rate of speed; that this fact was known to the plaintiff at the time of entering into the contract; that the plaintiff examined the machinery and plant "for the purpose of discovering and advising the said Frank Tousey as to whether or not the buildings Nos. 124 to 130 Pearl street in the borough of Brooklyn, were sufficiently strong to carry the said machinery while the same was in operation, and to operate which the plaintiff was to furnish the power as specified in the said lease;" that after making the examination the "plaintiff represented to said Frank Tousey that the premises Nos. 124 to 130 Pearl Street in the borough of Brooklyn were sufficiently strong to carry the plant and machinery of the said Frank Tousey, and to permit of the operation of the same; and the said Frank Tousey, upon receiving such representations and relying thereupon, entered into the lease hereinbefore referred to;" that the said Frank Tousey moved into the plaintiff's premises, placed his machinery, etc., and that the building proved to be too weak to support such machinery when operated at the high rate of speed demanded by his business; that the "representations made to the said Frank Tousey as hereinbefore set forth, were vital to the transaction, and were made with the intent that said Frank Tousey should act upon the same; that said Frank Tousey did act upon the same, and that they were false and were known to

the plaintiff to be false, and said Frank Tousey was injured thereby." The answer further alleges the removal, and sets up a counterclaim for the expense necessary in such removal, but this was not strongly urged, and the charge of the learned justice presiding practically took that question from the jury. If the allegations of the answer were true, if there was evidence from which the jury might properly draw the inference that the plaintiff, with intent to deceive and mislead Mr. Tousey, represented that the building and the premises demised were adequate for the purpose, and that Mr. Tousey entered into the contract relying entirely upon these representations, and these representations, made upon the personal knowledge of the plaintiff, proved to be false, the judgment might rest upon solid foundation ; but we read the record in vain for evidence supporting these material allegations. The nearest approach to evidence to support the allegations of the answer is found in the testimony of St. Clair Tousey, a brother and employee of the late Frank Tousey. He testifies that in the latter part of November, 1900, he and his brother, the lessee, visited the demised premises ; that the plaintiff and Mr. Blank, the plaintiff's foreman in the factory, which occupied the lower floors, were present, and that during the conversation the witness, who is a stranger to the contract, explained to Mr. Blank that they had heavy presses, and asked him about the strength of the floors, and that Mr. Blank replied, " Mr. Tousey, these floors are strong enough to hold your presses," and that Mr. Blank further said, " We have a very heavy machine on the top floor," and asked the witness to go up and look at it, but the witness declined, saying that he did not think it necessary as long as he thought the floors were strong enough. On his cross-examination Mr. Tousey says that on the " day that I and my brother went over in the month of November, when I say my brother called upon Mr. Prahar, I had no conversation with Mr. Prahar. I addressed no conversation to Mr. Prahar at all. The conversation I testified to was with Blank. This conversation took place on the third floor of Prahar's building." It thus appears that aside from the general statement of this witness that all four were present at the time of this alleged conversation, there is no evidence that either Mr. Prahar or Frank Tousey heard this alleged declaration of Mr. Blank that "these floors are strong

enough to hold your presses." This is the only direct evidence in the case of any representations on the part of any one that this building was adapted to the uses for which Frank Tousey rented the premises. Both Mr. Blank and Mr. Prahar positively dispute Mr. Tousey in respect to the presence of the plaintiff at this time, but we must assume that the jury has resolved this point in favor of the defendant. There is, however, no contradiction of the testimony of both the plaintiff and Mr. Blank that the latter was the foreman of the plaintiff's factory, and had no authority whatever to deal with the plaintiff's real property, and the verdict in this case rests upon the testimony that in a conversation between St. Clair Tousey and Mr. Blank, neither of whom had any legal interest in the contract or the premises, the latter stated, not that the building was safe for the purposes for which Frank Tousey desired it, but that the "floors are strong enough to hold your presses." There is not the slightest evidence to show that the attention of either the plaintiff or Frank Tousey was called to this conversation between St. Clair Tousey and Mr. Blank, which might easily have been carried on without attracting attention between the contracting parties. But assuming that all four persons were present and heard the conversation alleged, was the plaintiff in this action bound to dispute the mere opinion of Mr. Blank that the "floors are strong enough to hold your presses?" There is no evidence that the plaintiff knew of the inherent defects in the building generally, which made it unfit for the operation of the presses of the lessee, and the undisputed evidence is that the floors were strong enough to hold the presses, and that they did hold them for a period of over one year, during five or six weeks of which time they were operated at full speed, or at least at the speed which the lessee saw fit to use, and during the remainder of the time a portion of the presses were operated at full speed, while others were required to be reduced in motion. But they all remained there, and the floor held them for over one year, and there is no evidence that it would not have held them for the entire term. It was only because of the vibrations produced in the building generally, and which endangered the structure, that the public authorities, at the request of the plaintiff, examined the building and ordered the limitations upon the lessee, who covenanted in his lease to "make all repairs to the demised premises at his own cost and expense and

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will comply with all orders, regulations, ordinances, rules, &c., of any department or board of the City of New York," etc. The statement of Mr. Blank, under the circumstances developed by the evidence, is the only one made by any one who by any possibility could be said to represent the plaintiff in reference to the demised premises. There is not a particle of evidence that either the plaintiff or Mr. Blank knew or had reason to believe that the building was not strong enough to support the amount of machinery which St. Clair Tousey says he described to Mr. Blank, and the fact that the plaintiff occupied personally the lower floors, and permitted the machinery to be operated without protest for five or six weeks, is persuasive evidence that he had confidence in the building, and did not believe that it would fall down about his own ears.

The undoubted rule is that where a party, for the purpose of inducing another to contract with him, states, on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false, and without having reasonable grounds to believe it to be true, he is liable in fraud, if the statement is relied on and is subsequently found to be false, although he had no actual knowledge of the untruth of the statement. (*Daly v. Wise, supra*, 312, and authorities there cited.) But fraud is an affirmative defense, and must be proved (Chamberlayne's Best Ev. [8th ed.] 308, and authorities there cited); it must be shown that the plaintiff, or his agent, made a statement on his personal knowledge, without having reasonable grounds to believe it to be true, and that the statement subsequently proved to be false, to the injury of the defendant. It certainly does not appear by the evidence in this case that Mr. Blank or the plaintiff did not have reason to believe that the "floors are strong enough to hold your presses." The building, so far as the evidence shows, was strong enough to hold other heavy machinery which Mr. Blank offered to show; it was in evidence that at the time Frank Tousey and his brother, the witness, were present looking over this building, there were notices displayed upon the several floors, giving the weight which the several floors were capable of sustaining, the calculations being made by the department of buildings, and there is no evidence that the weight upon the press floor was greater than that authorized, or that the plaintiff had any reason, at that time, to apprehend that the

weight would be greater. St. Clair Tousey testifies that when they examined these premises they looked at each of the three floors, and that no one prevented them from examining the place as often as they desired. The plaintiff testifies that at the time of the examination the timbers of the building could be seen, so that the lessee had as good an opportunity of judging of the building as the plaintiff, and it not being shown that the plaintiff knew of any inherent defects in the building, it is difficult to understand how he could owe any duty to dispute the mere statement of opinion made by the foreman of his factory to St. Clair Tousey in the latter part of November.

The lease was not executed until the eleventh day of December, and to give plausibility to the theory that the plaintiff had made misrepresentations in respect to the capacity of the building St. Clair Tousey testified that, after the conversation above discussed, and early in December, 1900, "I saw Mr. Prahar at my brother's office building in Union Square. I saw Mr. Prahar and my brother leave that office together on that day. It was about noon time." Then one Charles E. Salmon was called as a witness. He was an employee of Frank Tousey, and he testified that early in December, 1900, the plaintiff came to the printing office of Frank Tousey in company with the latter during the lunch hour; that he was eating his lunch on the same floor as the presses, and that the plaintiff and Mr. Tousey passed around the room among the presses, and that the witness heard plaintiff say: "Yes, I know all about machinery," and the plaintiff admits: "I did make the remark that I knew all about machinery. I do know all about machinery, but know nothing about presses. There is quite a difference between machinery and the presses there. I am in the habit of running machinery in my line of business, but not presses." The evidence is furnished by the defendant, and is not disputed, that the presses were not running at this time, and there is absolutely no evidence that the plaintiff visited the printing establishment for the purpose of examining the plant and advising Frank Tousey, or for any other definite purpose; so far as appears it may have been mere idle curiosity. There is certainly no evidence in the case that the plaintiff ever made any misrepresentations as to the capacity or strength of the building subsequent to his visit to the plant of Frank Tousey, or that Mr. Blank

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ever made any such representations after the original interview in November, and while there is some additional testimony as to the plaintiff's visit to the plant while it was yet in the borough of Manhattan, there is none throwing any light upon the alleged representations of the plaintiff in respect to his own building, and the case comes right back to the alleged statement of the plaintiff's foreman to St. Clair Tousey, and we are clearly of opinion that this did not establish fraud on the part of the plaintiff. The contract was not made for at least twelve days after this alleged conversation ; it makes full provision for all of the details of the transaction, including an arrangement for power, and so far as we can discover from the evidence it was made under such circumstances that the question should have been disposed of as one of law, upon the plaintiff's motion for the direction of a verdict. In *Daly v. Wise* (*supra*, 312), where a much stronger representation was conceded to have been made by an agent, the court say : "It does not appear that the plumbing had not been fixed as stated, nor that the statement that 'it was all in good condition,' was made without actual or supposed knowledge of its condition, nor that it was made in bad faith, and we think the case does not fall within the principle of the authorities last cited."

The suggestion of the respondent that the judgment may be sustained under the provisions of chapter 345 of the Laws of 1860, incorporated into section 197 of the Real Property Law (Laws of 1896, chap. 547), is without force, as the statute does not apply to a case where the defect existed when the lease was made and no fraud or misrepresentation is shown on the part of the landlord, or when it results from the neglect of the tenant to make ordinary repairs, or from deterioration due to the ordinary use by the tenant. (*Meserole v. Hoyt*, 161 N. Y. 59, 61, 62, and authorities there cited.)

The judgment and order appealed from should be reversed and a new trial granted, under the rule recognized in *Sherman v. Ludin* (79 App. Div. 37).

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

In the Matter of the Judicial Settlement of the Accounts of PETER J. ELTING, as Trustee under the Last Will and Testament of ABIJAH CURTISS, Deceased, Respondent.

CAROLINE CURTISS JOHNSON and Others, Appellants.

Testamentary trustees — a decree on an intermediate accounting is final on the question whether a dividend should be credited to income or principal — refusal of the trustee to bring suit to correct an error in such credit.

Decrees approving the accounts filed by a testamentary trustee from time to time, by which accounts it appears that certain dividends received by the trustee were treated, not as principal, but as a part of the income of the trust fund and were paid over to the life beneficiaries, are, while they remain in force, conclusive against the parties to the accountings, and also against a remainderman who was not in being at the time the accountings were had, notwithstanding that on a subsequent accounting it is adjudged that the dividends in question should have been treated as principal.

The refusal of the trustee, after the rendition of the last-mentioned decree, to bring suit to recover from the life beneficiaries the dividends paid to them, although he was requested to bring such suit by a life beneficiary who offered to return the dividends which she had received, does not render the trustee guilty of a *devastavit*.

APPEAL by Caroline Curtiss Johnson and others from a decree of the Surrogate's Court of the county of Westchester, entered in said Surrogate's Court on the 16th day of February, 1903, settling the accounts of the trustees under the will of Abijah Curtiss, deceased.

James M. Hunt, for the appellants.

Ralph E. Prime, for the respondent.

JENKS, J.:

I think that the trustee is not chargeable with a *devastavit* as to the real estate dividends received from the Sixth Avenue Railroad Company. The testator died in 1888, and his original executors and trustees were succeeded by this trustee in 1896. These real estate dividends had been received by him and by his predecessors at various times throughout a number of years, had been classified by them as income and had been paid by them to the life beneficiaries. But upon the trustee's accounting, in 1901, the surrogate determined that the dividends must be credited to principal, and

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this was the disposition made of the dividends thereafter received. After that accounting, one of the life beneficiaries offered a check to the trustee to refund the dividends theretofore paid to her as income, with a statement of her reasons therefor, and demanded that the trustee should "take such proceedings as may be necessary to recover for the estate" the dividends erroneously paid to the other life beneficiaries, giving notice that she and her heirs would hold him "personally responsible" for any failure of recovery. The demand specified the payments complained of as made for a period intervening September 30, 1892, and July 2, 1900. The trustee, who had refused the check, did not heed the demand and has made no effort to comply with it. But in 1898, and again in 1900, the trustee had judicial settlements of his accounts, which are regarded as "final." (*Glover v. Holley*, 2 Bradf. 291; 2 Jessup Surr. Pr. [2d ed.] 1417 *et seq.*) He sets out therein all the moneys "received from all sources, * * * including all real estate dividends on the Sixth Avenue Railroad stock, and all disbursements and all payments, * * * including payments to the legatees and beneficiaries of the trusts of the moneys received from the real estate dividends on the Sixth Avenue Railroad stock," and the answer of the parties cited contained certain objections. In each instance the decree "finally and judicially settled and allowed such accounts so presented, and all payments credited therein, as credited, and approved the same, including the payments stated therein during the same period as made of said real estate dividends to the legatees and beneficiaries, being all thereof which were received."

Thus, it appears that this claim of *devastavit* is based upon the refusal of the trustee to take proceedings to recover certain payments made on account of income, which payments were embraced in certain of his prior formal accountings, and were stated therein as distributed to the life beneficiaries, and that such payments as so made had been approved by judicial decrees, which are in full vigor. But the parties to these accountings are concluded by the decrees. (Code Civ. Proc. § 2813.) The case is, in principle, similar to *Bowditch v. Ayrault* (138 N. Y. 222). In that case, the court, per PECKHAM, J., say: "The part payments made by the trustees upon the several past accountings made by them, must remain unaffected

by our decision herein. Those accountings have been approved by the surrogate, and must be regarded as conclusive upon all past transactions and payments covered by them. They form no bar, however, to the proper decision of the question now presented as to the distribution of the property now in the hands of the trustee." (See, too, *Gill v. Brouwer*, 37 N. Y. 549; *Matter of Denton v. Sanford*, 103 id. 607; *Matter of Hoyt*, 160 id. 607, 618; *Altman v. Hofeller*, 152 id. 498, 502 *et seq.*) In *Matter of Underhill* (117 N. Y. 471, 477) *semble* that the amount of the estate is enhanced by any payment disallowed by the surrogate, and that when the legatee is a party to the accounting, the fact of over-payment is conclusive in any further litigation between the executor and legatee where it could come in question. I think that the converse of this proposition is equally true. In *Wright v. Trustees of Methodist Epis. Church* (1 Hoff. Ch. 202, 214) it is held: "The decree of the surrogate is absolute and final. The remedy was an appeal to the chancellor. It has become pleadable in every court as the final sentence and judgment of a competent tribunal upon every matter which it professes to decide, and which is within the jurisdiction of that forum. To suppose that the 65th section of the statute (2 R. S. p. 94) is confined to the mere fact that the payments have been made—dispensing only with the preservation of vouchers, seems to me inconsistent with the object of the statute, and destructive of its utility. The clause in question is 'that the final settlement of the executor's accounts made in the mode prescribed, shall be conclusive evidence of the following facts, and no others. 1st. That the charges made in such account for monies paid to creditors, legatees, next of kin, and for necessary expenses *are correct.*' This phrase cannot mean less than this—that the validity of a debt, and the right of a legatee, is as much pronounced correct, as the fact of his reception of the money." All of the parties now before the court were cited on these prior accountings save the infant, Abigail Johnson. As to such parties the decrees are conclusive. (*Authorities supra*; *Matter of Tilden*, 98 N. Y. 434, 441.) And Abigail, too, who was not then *in esse*, but is now a remainderman, is likewise concluded. (*Rhodes v. Caswell*, 41 App. Div. 229, citing authorities.)

The trustee then has the protection of adjudications that determine

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that the payments in question were properly made to the life beneficiaries. If, in effect, he avail himself of the force and conclusiveness of these adjudications, and refuse to act upon the demand of one of the parties bound thereby, can it be said that he is guilty of a devastavit? I think not. I think that he is entitled to interpose those judicial settlements to any assertion upon this accounting of his negligence, based upon his inaction. (See *Mutual Life Ins. Co. of N. Y. v. Schwaner*, 36 Hun, 373; affd., 101 N. Y. 681.) It is not a question upon this appeal whether the adjudications were correct or otherwise, for in any event they are none the less binding so long as they stand unreversed and unimpeached. (*Buffalo & State Line R. R. Co. v. Supervisors of Erie County*, 48 N. Y. 93, 98.) If, notwithstanding the statute and the decisions explicitly stating the conclusiveness of such decrees, the trustee could be held guilty of a devastavit, despite his invocation of the decrees, such a determination would be destructive both of the statute and of the precedents. The learned counsel for the appellants says that he does not seek to set aside any decision made by the surrogate upon any previous accounting, but asks only that the principal of the estate, which has been depleted by erroneous payments under a mistake of fact, be returned. But does not this beg the question? In the face of these adjudications, can it be said that the payments are erroneous in the sense that the trustee is guilty of a devastavit in not seeking a recovery thereof? I do not see that subdivision 6 of section 2481 of the Code of Civil Procedure is applicable, inasmuch as this is not an application to open, vacate, modify or set aside the decrees which are the shield of the trustee. Indeed, as I have said, the learned counsel expressly states that "these appellants did not seek before the surrogate and do not seek now to set aside any decision made by the surrogate upon any previous accounting."

The division of the estate into five separate trusts was embraced in the previous accounting. This was objected to and passed upon by the surrogate, and I think that the matter is now *res adjudicata*. (Authorities *supra*; *Matter of Garth*, 10 App. Div. 100; *Kager v. Brenneman*, 47 id. 63; *Matter of Willets*, 112 N. Y. 289.)

The trustee did not unqualifiedly refuse to accept the check of refund tendered to him. It was tendered with a proposed receipt reading, in part, "being the amount of the real estate dividends from

the stock of the Sixth Avenue Railroad Company, held by estate of Abijah Curtiss, erroneously paid to her as income, as decided by the Surrogate in his decision of January 15th, 1901, in the above entitled matter." The trustee refused acceptance on the express ground that he could not sign the receipt and could not accept the check under the terms of the receipt, for the reason that the decree of the surrogate had confirmed these payments. I think that the trustee was justified in such refusal. (*Noyes v. Wyckoff*, 114 N. Y. 204, 207.)

The decree of the surrogate should be affirmed.

All concurred.

Decree of the Surrogate's Court of Westchester county affirmed, with costs payable out of the estate.

JAMES S. WARDEN, Respondent, *v.* NIKOLA TESLA, Appellant.

Contract for the sale of land — where the price is fixed by the acreage, it is determined by the actual, not the paper acreage — the admission of proof as to the paper acreage by one party entitles the other to give like proof.

Where a contract provides that the sum of twenty-five dollars an acre shall be paid for a tract of land described by metes and bounds, as "containing four hundred and ten acres more or less," the actual acreage and not the paper acreage governs.

Where, however, a party claiming under the contract is permitted to give evidence of the paper acreage, a refusal to allow his adversary to give similar evidence is improper.

APPEAL by the defendant, Nikola Tesla, from a judgment of the County Court of Suffolk county in favor of the plaintiff, entered in the office of the clerk of the county of Suffolk on the 9th day of May, 1903, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 1st day of June, 1903, denying the defendant's motion for a new trial made upon the minutes.

Edwin B. Smith, for the appellant.

William L. Marshall [*Henry B. Johnon* with him on the brief], for the respondent.

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HOOKER, J.:

This action arose out of an alleged breach of defendant's contract to pay the plaintiff, as consideration for an option on certain real property, given by the latter, a sum equal to the annual interest at four per cent of the purchase price of the land in quarterly installments in advance. The purchase price is provided to be twenty-five dollars per acre of a tract described by metes and bounds, its description concluding in these words: "containing four hundred and ten acres more or less." Upon the trial the plaintiff testified that he had "computed the number of acres contained in the metes and bounds contained in this agreement * * * as well as I could from the data I have." To the question, "How much is it?" the defendant entered the general objection that it was incompetent, immaterial and irrelevant, and the court observed that it might be objectionable "on the data which he has," to which the witness volunteered, "Well, I have." The plaintiff further testified in answer to counsel's questions, and without exception or further objection by the defendant, that it contained about 420 or 430 acres; that the purchase price of 410 acres at \$25 per acre was \$10,250, and that the interest on that sum at four per cent per annum for three months was \$102.50. It appeared that the defendant had failed to pay six installments of \$102.50, that sum being the amount of each installment, based upon the four per cent of the purchase price of 410 acres at \$25 per acre. The defendant contends upon this appeal that, inasmuch as the agreement to purchase was at a given amount per acre, it was incumbent upon the plaintiff to show how many acres were actually contained in the piece described, and the purchase price be thus determined, that the percentage thereof, which was to be the consideration for the option, might be computed therefrom; and he invokes the doctrine that where no sum is determined upon for the tract as a whole, but it is to be taken at so much an acre, the quantity of actual acreage on the surface of the ground must be correctly ascertained to fix the consideration to be paid. The rule is plainly applicable to the contract under consideration; the authorities to sustain the contention are so abundant and so firmly establish the rule that more than a citation of them would serve no useful purpose. (*Wilson v. Randall*, 67 N. Y. 338; *Witbeck v. Waine*, 16 id. 532; *Murdoch*

v. *Gilchrist*, 52 id. 242; *Tarbell v. Bowman*, 103 Mass. 341; *Cardinal v. Hadley*, 158 id. 352; *Paine v. Upton*, 87 N. Y. 327; *Gallup v. Bernd*, 132 id. 370.)

The measure of the defendant's liability was determined, not by the number of paper acres, but by the actual acreage; while the description in the agreement seems to be full and complete it is based upon monuments and fixed bounds; the tract is bounded on one side by the lands of the late Dickerson, and a cardinal point in the description is the Woodville road; although the lines are stated to be of a given length in feet, a survey might easily reveal that a strict measurement of the length of those lines would not accord with Dickerson's lands or the road; hence, the actual acreage of the tract might be greater or less than 410.

The objection we have referred to is held by the plaintiff insufficient to raise this question, because of the absence of an exception, and this is true; but the defendant did except to the overruling of his objection, stated to be on the ground that it is a demand for the payment of \$102.50, which sum does not appear to be due, to the admission in evidence of a letter from the plaintiff's agents to the defendant, demanding that sum as quarterly payment under the terms of the contract, and this exception was taken to a ruling of the learned trial court at variance with the correct principles of law applicable to the matter in issue, and thereby the question discussed is raised for our review. The erroneous theory upon which the judgment in plaintiff's favor was based requires a reversal.

The record presents additional evidence for the reversal of the judgment. The plaintiff was called as a witness and asked if he had computed the number of acres contained in the metes and bounds as described in the agreement, and upon his affirmative answer was further asked questions to which he replied that the tract contained something over 400, about 420 or 430 acres. No objection was entered. The plaintiff was sufficiently skilled in mathematics correctly to make the computation from the data of the description of the property appearing in the contract. William S. Jones, the only witness called by the defendant, read the description and was then asked by defendant's counsel: "Now, have you made a computation of the quantity, of the number of acres, that would be included in those metes and bounds there mentioned?" The plaintiff

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objected to the question on the ground that it was incompetent, immaterial and irrelevant, but not on the ground that the witness was incompetent. It was excluded by the court, and the defendant excepted. Under the view I take of the true interpretation of this contract, by virtue of the authorities cited above, the question would have been incompetent and immaterial had it not been for the fact that the plaintiff himself invited and tendered an issue as to the number of paper acres as distinguished from the number of acres actually existing on the surface of the ground. One of the witnesses thought the number of acres appearing, based upon a computation of the metes and bounds of the contract, was more than 410. It was surely competent for the defendant to show, if he could, and if such was the fact, that the acreage was less than that amount. It is fair to assume that such would have been the nature of the testimony of the witness Jones had he been allowed to answer. Because, at the initiative of the plaintiff, the case was tried upon the theory that the paper acreage should govern, he cannot complain of evidence on the part of the defendant to show less acreage than he himself claimed. Except for one or two phrases in the description slightly indefinite, such as "southerly about three degrees west," the problem of the computation was accurately solvable by any careful high school student who understood the principles of trigonometry and possessed tables in trigonometry. At any rate, plaintiff claimed to have made a calculation and gave his results, and should not have been allowed to prevent the defendant from attempting to show the contrary of what he had proved. The evidence was offered by the defendant for the purpose of traversing an essential point in plaintiff's case, and its exclusion constituted reversible error.

Inasmuch as the question is likely to arise upon a retrial, it is proper to state that the defendant's claim of misdescription of plaintiff's capacity is, in the light of recent decisions, not well taken. (*Hoffman House v. Foote*, 172 N. Y. 348; *Henricus v. Englert*, 137 id. 488.)

The judgment should be reversed and a new trial ordered.

All concurred; BARTLETT and JENKS, JJ., on last ground stated in the opinion.

Judgment and order of the County Court of Suffolk county reversed and a new trial ordered, costs to abide the event.

LOTTIE GAINES, Respondent, v. THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Appellant.

Insurance—breach of a warranty that the beneficiary was the insured's wife.

A warranty contained in a policy of accident insurance that the beneficiary therein is the wife of the insured, will, if false, render the policy void.

APPEAL by the defendant, The Fidelity and Casualty Company of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 16th day of May, 1903, upon the verdict of a jury, and also from an order entered in said clerk's office on the 13th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

Charles C. Nadal [W. D. Stiger with him on the brief], for the appellant.

W. C. Beecher [Alfred C. Cowan with him on the brief], for the respondent.

HOOKER, J.:

Defendant appeals from a judgment in favor of the plaintiff for the principal sum of an accident policy issued by the defendant, and from an order denying defendant's motion for a new trial. The complaint alleges that the defendant issued its policy of insurance to Ulysses Gaines, which provided that the principal sum should be payable in case of his death to Lottie Gaines, whom he described in the schedule of warranties made by him at the time the policy was issued, and which appears to be a part of the policy itself, as his wife. The answer admits the issuance of the policy of insurance, and no question was raised upon the trial as to the sufficiency of the proofs of death. For a separate defense the defendant alleges that prior to the issuing of the policy and also by its terms and provisions the assured represented to the defendant that he was a married man and had a wife then living, named Lottie Gaines, to whom the policy should be made payable; that these statements he warranted to be true, and that the policy of insurance was issued on the consideration and faith of those warranties; that the statements were

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false and untrue, because the assured was not then married, and the said Lottie Gaines was not his wife, and asserts the conclusion that there was a breach of said warranties, and the policy of insurance was, and therefore is, void. For a further separate defense the defendant alleges that by the terms of the policy of insurance it was stipulated that the policy should not cover any injury, fatal or otherwise, resulting from duelling or fighting, and that the assured died from injuries resulting from fighting. It alleged still another separate defense to the effect that it was provided in the policy that in case the assured should suffer injuries, fatal or otherwise, intentionally inflicted by himself, or by any other person, the liability of the defendant should be limited to the amount of the premium and no more, which was sixteen dollars, and that the insured came to his death by a gunshot wound intentionally inflicted by another person.

It developed from the evidence that the assured was shot and instantly killed by one Connors; the witness Jackson was the only person present at the shooting. The court submitted to the jury the questions whether the assured died from the injuries which resulted from fighting and also whether the injuries which caused his death were intentionally inflicted by Connors. The evidence upon these issues adduced by the plaintiff was, in our opinion, sufficient to present a question of fact for the jury, and from that evidence that body might well have found as a fact that the assured was not engaged in fighting at the time he received the injuries from which he died, and likewise that Connors did not intentionally inflict upon the assured the injuries which resulted fatally.

At the close of plaintiff's case, and again at the close of all the evidence, the defendant moved to dismiss the complaint upon the ground that there had been a breach of warranty in that the assured had warranted that Lottie Gaines, the beneficiary named in the policy, was his wife, and that it appeared upon the trial that she had not and did not at the time of his death bear that relation to him. The motion was also based on other grounds, and in denying it the court said: "On the breach of warranty there is no question that this case is fairly covered by the *Story* * case; there is no doubt about that."

* See citation, *post*, p. 530.—[REP.]

The refusal to grant this motion constitutes error for which the judgment and order must be reversed. It was undisputed that some twenty years ago the plaintiff, the beneficiary named in the policy, was married to one Tazewell in the State of Virginia, and that no divorce has ever been granted in favor of either the plaintiff or Tazewell. For about nine years prior to his death the assured had been living with the plaintiff in the borough of Manhattan, had paid the rent of the premises where they resided, and had supported himself and her and a daughter of plaintiff by Tazewell. During that nine years she bore to the assured two children, both of whom died in infancy. No serious effort was made upon the trial to show that the relation of husband and wife existed between the plaintiff and the assured, as a result of a civil contract without ceremony; the only evidence upon that branch of the case was that Ulysses Gaines supported the family and had introduced the plaintiff as his wife. The record is barren of any evidence to show that any agreement *in praesenti*, to assume the marital relations, had ever been entered into, and is likewise wanting in evidence that at the time the deceased and plaintiff commenced their cohabitation she had not heard from or concerning Tazewell for a period of five years, and did not know of his whereabouts, or supposed him dead. The record, therefore, presents a situation where husband and wife had separated and the wife was living in open and notorious adultery with the assured, and the question is fairly presented whether the representation made by the assured at the time the policy was written, that Lottie Gaines was his wife, was such a warranty as, if false, was sufficient to render the policy of insurance void.

The contract upon which the action is based provides that the defendant upon certain money considerations and upon the consideration "of the statements in the Schedule hereinafter contained, which statements the Assured makes on the acceptance of this Policy and warrants to be true," insured the deceased, etc. Annexed to the policy is a "Schedule of Warranties" purporting to be made by the assured; among the statements there made by him are his age, height, weight, color, residence, employment, duties of his occupation, income, habits and health, as well as the statement involved in this discussion, which reads as follows: "Policy to be payable in case of death to * * * Lottie Gaines, relationship

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wife." We think it established, as matter of law, from the evidence presented in this record that neither at the time of the issuance of the policy nor at the time of his death was Lottie Gaines, the plaintiff, the wife of the assured, and no circumstances exist which permit us to say that she bore such relationship to him as would nullify the effect of his warranties that she was his wife.

Whether a warranty or representation contained in an application for accident insurance, or where made a part of the contract, that the beneficiary is the wife of the assured is such a warranty as will work a forfeiture of the contract, does not seem to have been the subject of any reported judicial determination in this State. It is said in *May on Insurance* (§ 305) that "in the Superior Court at Buffalo it was held, where the statements were warranties, that a representation that the person for whose benefit the policy was taken out was the wife of the applicant, when in fact she was not, was untrue and worked a forfeiture." It is doubtless this same case which Bliss refers to in his work on *Life Insurance* (§ 120), where he says: "In an unreported case, the Superior Court of the City of Buffalo, held a policy forfeited, where in the application, the statements in which were made warranties, it was stated that the assured was the wife of the insured, and the jury found that such was not the fact."

It is fair to assume that the defendant, and accident insurance companies generally who ask for representations as to the relationship of the proposed beneficiaries, and require that such representations shall be warranties of the assured, do this for the purpose of ascertaining the manner of life, the environments and habits of such as apply for insurance, that they may reject the applications of those they may deem undesirable risks, employing the judgment and experience of their officers and managers upon the question of the desirability to insure those persons whose answers disclose certain peculiarities of character, and manner of life, as well as those where unusual conditions of health or financial status are revealed.

This question was discussed in *Travelers' Ins. Co. v. Lampkin* (5 Colo. App. 177; 38 Pac. Rep. 335) in which the Colorado Court of Appeals adopted much the same view that we hold in respect to the effect of the warranty. In *Mutual Aid Society v. White* (100 Penn. St. 12) the policy contained the provision that if any of the statements

of the applicant made in his application for the policy were untrue and false, the contract was forfeited. One of the questions asked the applicant was whether he was married, and, second, the name of his consort. He left unanswered the first, and answered the second question by stating that he was a widower. It was there held that the court erred in submitting to the jury for its construction the answer to the first question, saying that it was the duty of the trial court to construe this portion of the contract as well as every other part thereof. It was there determined that "the defendant had a right to have an unqualified answer to its fifth point; if the jury believed that, at the time of the application, Patrick Murray was not a widower, the plaintiff ought not to have recovered."

In *Jeffries v. Life Ins. Co.* (22 Wall. 47) the deceased, in answer to an inquiry in his application, whether he was married or single, falsely answered he was single, and under the express conditions and agreements which were a part of his contract of insurance, this statement he declared to be true, and the policy was issued on the faith of the statement and declarations made in the application. The Supreme Court of the United States, Mr. Justice HUNT delivering the opinion, said: "It is contended, also, that the false answers in the present case were not to the injury of the company, that they presented the applicant's case in a less favorable light to himself than if he had answered truly. Thus, to the inquiry are you married or single, when he falsely answered that he was single, he made himself a less eligible candidate for insurances than if he had truly stated that he was a married man; that although he deceived the company, and caused it to enter into a contract that it did not intend to make, it was deceived to its advantage, and made a more favorable bargain than was supposed.

"This is bad morality and bad law. No one may do evil that good may come. No man is justified in the utterance of a falsehood. It is an equal offense in morals, whether committed for his own benefit or that of another. The fallacy of this position as a legal proposition, will appear in what we shall presently say of the contract made between the parties.

"We are to observe, first, the averment of the plea: That Kennedy, in and by his application for the policy of insurance, in answer to a question asked of him by the company, whether he was

‘*married or single?*’ made the false statement that he was ‘*single*,’ knowing it to be untrue; that in reply to a further question therein asked of him by the company, whether ‘*any application had been made to any other company? If so, when?*’ answered ‘*No;*’ whereas, in fact, at the time of making such false statement, he well knew that he had previously made application for such insurance, and been insured in the sum of \$10,000 by another company. * * *

“There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it.

“It is the distinct agreement of the parties, that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal.

“The case in hand affords a good illustration of this principle. The company deems it wise and prudent that the applicant should inform them truly whether he has made any other application to have his life insured. So material does it deem this information, that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly if he answers one way, viz., that he is single, or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial. But if, under any circumstances, it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial. Insurance companies sometimes insist that individuals

largely insured upon their lives, who are embarrassed in their affairs, resort to self-destruction, being willing to end a wretched existence if they can thereby bestow comfort upon their families. The juror would be likely to repudiate such a theory, on the ground that nothing can compensate a man for the loss of his life. The juror may be right and the company may be wrong. But the company has expressly provided that their judgment and not the judgment of the juror shall govern. Their right thus to contract, and the duty of the court to give effect to such contracts, cannot be denied."

It seems hardly necessary, upon this subject, too add anything to the lucid reasoning of the opinion of the Federal court. It is sufficient to say that there is no authoritative decision of any court in this jurisdiction holding a contrary view. We have called attention to the remark of the court granting a nonsuit, that the "*Story case*" governed the question of warranty. The case apparently referred to is that of *Story v. Williamsburgh Masonic Mutual Benefit Association* (95 N. Y. 474). That case falls far short of declaring in favor of the contention made by the respondent. In that case Robert Story married the plaintiff some fourteen years before the issuance of a certificate in the defendant association, and died shortly thereafter. The object of the association was to provide for the relief of widows, orphans and heirs of deceased members, and the by-laws required that upon the death of a member the widow be paid the sum specified ; upon the failure of the widow, the sum to be paid to the children ; and upon their failure, to other persons named therein. The certificate upon which the plaintiff there sued and which had been issued to Story, certified that in accordance with the by-laws and articles of the association, his wife, Mary Story, the plaintiff, was designated as beneficiary. The association defended the action brought by Mary Story upon the ground that she had not been lawfully married to Robert Story, for the reason that he had another wife living at the time of their marriage. The Court of Appeals affirmed a judgment in plaintiff's favor, and held that the by-law did not limit the power of the defendant so as to prevent it from recognizing as the beneficiary a person designated by a member as his wife, and that the certificate operated as an assent of the defendant association to that designation and entitled the person so designated, upon the death of the

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member of the association in the absence of any other designation or repudiation of the agreement evidenced by the certificate, to receive the fund. Neither the language, nor the reasoning of Judge ANDREWS, who wrote the opinion of the court, can be construed as an authority for the plaintiff's contention that the warranty of Ulysses Gaines, if untrue, was insufficient to render his contract of insurance void. The question of warranty was not in that case. (See *Clements v. Connecticut Indemnity Co.*, 29 App. Div. 131, and cases cited; *Clemans v. Supreme Assembly R. S. of G. F.*, 131 N. Y. 485, and cases cited; *Cushman v. U. S. Life Ins. Co.*, 63 id. 404.)

The judgment and order appealed from must, therefore, be reversed, with costs.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

ALFRED NOLAN MARTIN, Appellant, v. PRESS PUBLISHING COMPANY, Respondent.

Libel—innuendoes not justified by the publication do not, where it is libelous per se, take the case from the jury — what article as to the poverty of a college professor brings him into ridicule and is libelous per se.

Where the plaintiff in an action of libel, by innuendoes or allegations of that nature, has attributed meanings to the alleged libelous publication which are unsupported by its language, the court may, nevertheless, if the publication is libelous *per se*, submit the case to the jury.

If the tendency of a written or published article is to disgrace, or bring into ridicule or contempt, the person concerning whom it is written or published, the article is libelous *per se*.

A newspaper article read as follows: "Savant cannot make a living. Old Oxford Professor and family in sad straits. That the battle for existence is not won by brains alone is illustrated in the sad plight of Prof. Alfred Nolan Martin, at Richmond Park, Staten Island. A man of extraordinary attainments in classical learning and once a professor in Oxford University, he is now in sad straits because his education hampers him in earning a living. He is living with his young wife and two small children in a house which has not a single door or window inclosed. He is too poor to finish his dwelling and too proud to ask aid. His neighbors say he is starving. In his life—he is now over

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fifty — Prof. Martin has been, besides an Oxford professor, a sanitary engineer, a lecturer, a social adjutator, a school teacher and an author. Seven years ago, while with the Staten Island Health Department, he married Miss Cooper, of Stapleton, a graduate of the New York University Law School. Then he lost his place."

Held, that the article exposed the person referred to therein to public ridicule and tended to abridge his comfort and to injuriously alter his station in society and was, consequently, libelous *per se*.

BARTLETT and JENKS, JJ., dissented.

APPEAL by the plaintiff, Alfred Nolan Martin, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 10th day of July, 1903, upon the dismissal of the complaint by direction of the court upon the plaintiff's opening on a trial at the Kings County Trial Term, and also from an order entered in said clerk's office on the 10th day of July, 1903, denying the plaintiff's motion for a new trial made upon the minutes.

Ira Leo Bamberger [*Saul S. Myers* with him on the brief], for the appellant.

James W. Gerard [*Manfred W. Ehrich* with him on the brief], for the respondent.

HOOKER, J.:

The plaintiff has sued for damages on account of the alleged malicious publication in the defendant's newspaper of the following article :

"Savant cannot make a living. Old Oxford Professor and family in sad straits. That the battle for existence is not won by brains alone is illustrated in the sad plight of Prof. Alfred Nolan Martin, at Richmond Park, Staten Island. A man of extraordinary attainments in classical learning and once a professor in Oxford University, he is now in sad straits because his education hampers him in earning a living. He is living with his young wife and two small children in a house which has not a single door or window inclosed. He is too poor to finish his dwelling and too proud to ask aid. His neighbors say he is starving. In his life—he is now over fifty—Prof. Martin has been, besides an Oxford professor, a sanitary engineer, a lecturer, a social adjutator, a school teacher and an author. Seven years ago, while with the Staten Island Health

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Department, he married Miss Cooper, of Stapleton, a graduate of the New York University Law School. Then he lost his place."

Upon the trial, before any evidence was taken, the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. This motion was granted, and plaintiff appeals from the judgment entered thereon and from the order denying his motion for a new trial. In denying the motion for a new trial the learned court below wrote an opinion in which he reached the conclusion that the published words were not susceptible of the particular meanings alleged in the complaint to be attributable to them, and held that, therefore, the complaint did not state a cause of action. (*Martin v. Press Publishing Co.*, 40 Misc. Rep. 524.) Since the writing of that opinion the Court of Appeals has decided the case of *Morrison v. Smith* (177 N. Y. 366), in which the recent cases in the Appellate Division, upon which the court below relied in his disposition of the motion (*Brown v. Tribune Association*, 74 App. Div. 359; *Morse v. Press Pub. Co.*, 49 id. 375, and *Morrison v. Smith*, 83 id. 206), were distinctly overruled, and it is now the established law in this State, by reason of the recent utterance of the court of last resort, that where by innuendo or allegations of that nature the plaintiff has put meanings upon the alleged libelous publication unsupported by its language, the court may nevertheless, if the article is libelous *per se*, submit the case to the jury. The question, therefore, presented for our consideration is whether the article which we have quoted is libelous *per se*. If the question is answered in the affirmative, the judgment and order must be reversed, for the innuendos and allegations of the complaint as to the meaning to be attached to its phrases and sentences may be disregarded.

Somewhat more recent cases in the Court of Appeals upon the subject of what constitutes libel *per se* are *Morey v. M. J. Association* (123 N. Y. 207); *Moore v. Francis* (121 id. 199); and *Shelby v. Sun Printing Association* (38 Hun, 474; affd. on opinion below in 109 N. Y. 611). It is in those cases declared that if the tendency of a written or published article is to disgrace the plaintiff or bring him into ridicule or contempt, the matter is libelous *per se*. The case of *Cropp v. Tilney* (3 Salk. 226) is cited twice with approval as holding that scandalous matter was not necessary

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to make the libel, it being enough if it induced an ill opinion to be had of the plaintiff or make him contemptible and ridiculous ; it is declared that the publishing of anything concerning another, which tends to hinder mankind from associating or having intercourse with him is actionable. The language of Starkie on Slander and Libel (Am. ed. from 2d Eng. ed. of 1836, *p. 169) is substantially quoted with approval where it is said that for any false, malicious and personal implication "tending to alter a party's station in society for the worse, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts by exposing him to disgrace and ridicule," an action will lie. We think that the words published of the plaintiff in this case are well within the rule to which we have called attention. The publishing of one who has had every advantage of education, and possesses extraordinary attainments in classical learning, that he is poverty stricken, that he cannot afford to put doors and windows into his unfinished house, and that he is starving, all because of being overeducated, holds him up before the public as ridiculous, and tends to abridge his comfort by exposing him to ridicule ; their tendency is to alter his station in society for the worse. This is evidently the view which the late General Term of the first department took of an article alleged to have been libelous *per se*, published by the defendant in *Moffatt v. Cauldwell* (3 Hun, 26). There the plaintiff was described as having been reduced from affluence to poverty, and journalistic color, so called, was injected into the article. Mr. Justice BARRETT, speaking for the court, said this : "As an abstract generality it is true that mere poverty ought not to expose any citizen to ridicule. But the proposition that ridicule is a *non sequitur* from such an imputation is not universally true. One may be so circumstanced, and the fact of his alleged misery may be so put, as to excite ridicule and nothing else. Take, for instance, the case of any well known citizen of wealth ; assume his retirement from business, so as to eliminate all questions of mercantile credit. While he is still occupying a comfortable house, and perhaps entertaining in a hospitable manner, a sensational account of his misfortune appears in a public journal, stating, as in the present case, that he 'breathes,' but scarcely 'lives,' in a 'garret ;' that he manages, by constantly sewing for a tailor, to eke out a 'scanty pittance' and a wretched

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life; that, for years, he has lived by the sale of his personal effects, saved from the general wreck; and other minute details. Can it be doubted that such a 'sensation,' taken in its length and breadth, and under such circumstances, would tend to expose the person in question to ridicule? Again, neither is wealth a crime. Yet a poor man may be held up to ridicule by a false and malicious account of his sudden, though perfectly honest, acquisition of fortune, coupled with an elaborate and highly colored picture of his luxurious life and splendid entertainments. It comes to this, that the question whether or no the matter is libelous, so as to be actionable, depends upon the style, scope, spirit and motive of every such publication, taken in its entirety. The inquiry is, then, into the natural effect of the publication, not only upon the general public, but upon the neighbors and friends of the person aimed at."

The Appellate Division of the first department in *Battersby v. Collier* (24 App. Div. 89) has said that "the imputation of poverty and squalor and alleged misery may be so put as to excite ridicule and so amount to defamation," citing the *Moffatt* case. (See 18 Am. & Eng. Ency. of Law [2th ed.], 913.) The facts are well within the principle of these cases, and within the general definitions upon the subject.

The judgment and order must be reversed.

All concurred, except BARTLETT and JENKS, JJ., dissenting.

Judgment and order reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JOHN EDWARD EASTMOND, Respondent, v. JOHN T. OAKLEY, as Commissioner of Water Supply, Gas and Electricity of the City of New York, and THOMAS F. BYRNES, as Deputy Commissioner of Water Supply, Gas and Electricity for the Borough of Brooklyn, Appellants.

Removal of the water registrar of Brooklyn—he is not the "head of a bureau."
The water registrar for the borough of Brooklyn in the department of water supply, gas and electricity of the city of New York is not the "head of a bureau" within the meaning of section 1543 of the charter of the city of New York (Laws of 1897, chap. 378, as amd. by Laws of 1901, chap. 466), which

provides: "But no regular clerk or head of a bureau, or person holding a position in the classified municipal civil service subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation."

The position of "water registrar" created by section 2 of title 15 of the charter of the former city of Brooklyn (*Laws of 1888, chap. 583*), which organized a "bureau for the collection of the revenue arising from the sale and use of water, the chief officer of which shall be called the 'water registrar,'" was completely abolished on January 1, 1898, by virtue of section 1615 of the Greater New York charter.

In view of the provision of section 458 of the charter of 1897, authorizing the commissioner of the department of water supply to organize such bureaus as he should from time to time deem necessary to the proper discharge of the duties of his department, and directing that he locate a branch of each of the bureaus so organized in the public hall or building of the borough of Brooklyn for the discharge of all the duties of the department devolving upon such bureau or bureaus, so far as such duties appertain to the borough of Brooklyn, and of the fact that the commissioner of water supply of the city of New York, pursuant to such authority, organized two bureaus, viz., the bureau of civil engineers and the bureau for the collection of revenue derived from the sale and use of water in the city of New York, the chief officer of which latter bureau he directed should be known as water registrar, and of the further fact that the commissioner directed that a branch office of the latter bureau should be maintained in the municipal building of the borough of Brooklyn, it cannot be said that the chief officer of the Brooklyn branch was the "head of a bureau" within the meaning of section 1543 of the charter.

APPEAL by the defendants, John T. Oakley, as commissioner of water supply, gas and electricity of the city of New York, and another, from so much of an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 8th day of February, 1904, as directs the issuance of an alternative writ of mandamus.

James D. Bell, for the appellants.

Arnon L. Squiers, for the respondent.

HOOKER, J.:

The defendant Oakley is commissioner of water supply, gas and electricity of the city of New York, and Thomas F. Byrnes is deputy for the borough of Brooklyn. This is an appeal from an order made at Special Term, directing that an alternative writ of mandamus issue against them forthwith, to restore and reinstate the

relator as water registrar of the borough of Brooklyn, and to the position and performance of the duties and enjoyment of the emoluments and privileges of such office, or that they show cause to the contrary.

The relator was appointed on the 9th day of January, 1903, water registrar for the borough of Brooklyn, in the department of water supply, gas and electricity, his predecessor in office having died. On January 1, 1904, the appellant Oakley was duly appointed commissioner of the department, and the appellant Byrnes deputy commissioner for the borough of Brooklyn. Oakley removed the relator from his position and appointed another to succeed him, who took physical possession of the office of the water registrar in the municipal building in the borough of Brooklyn, and ousted the relator therefrom.

The relator was neither a veteran of the Civil war, nor a veteran volunteer fireman; was not in the classified municipal civil service; had not been appointed from any civil service list, and has no protection under section 21 of chapter 370 of the Laws of 1899, as amended by chapter 270 of the Laws of 1902; and claims none. Section 1543 of the charter of the city of New York (Laws of 1897, chap. 378, as amd. by Laws of 1901, chap. 466) provides in part as follows: "The heads of all departments and all borough presidents (except as otherwise specially provided) shall have power to appoint and remove all chiefs of bureaus (except the chamberlain), as also all clerks, officers, employes and subordinates in their respective departments, except as herein otherwise specially provided, without reference to the tenure of office of any existing appointee. But no regular clerk or head of a bureau, or person holding a position in the classified municipal civil service subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation; and in every case of a removal, the true grounds thereof shall be forthwith entered upon the records of the department or board or borough president, and a copy filed with the municipal civil service*." Under the provisions of this section the relator claims that his removal, which was without the preferment of charges and without the opportunity of making an explanation, was illegal and void; for he asserts that the position he held was

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that of "head of a bureau" as those words are understood in that section. No claim is made that he was a "regular clerk," nor will the facts as they appear in the record warrant that appellation of the office he held. The relator's claim to have been the head of a bureau is based largely upon the language of subdivision 3 of section 2 of title 15 of chapter 583 of the Laws of 1888, the charter of the former city of Brooklyn, which created a "bureau for the collection of the revenue arising from the sale and use of water, the chief officer of which shall be called the 'water registrar.'" The relator shows that he was called the water registrar of the borough of Brooklyn, in the department of water supply, gas and electricity, and contends that the force of this act extends into the present organization and government of the city of New York, to the extent that the relator before his removal was the head of the bureau. Section 1615 of the charter of the city of New York, however, provides that all offices forming a part of the local government of the municipal and public corporations and parts thereof, including cities, villages, towns and school districts, but not including counties, which were on the 1st day of January, 1898, united and consolidated into the present city of New York, were abolished as to all the territory embraced within the limits of the city of New York, except as in the charter otherwise expressly provided.

It was decided in *People ex rel. Tate v. Dalton* (158 N. Y. 204) that the water registrar of the city of Brooklyn, who was by force of section 1536 of the charter of the city of New York transferred into the department of water supply in that city, became thenceforth an employee of the latter city, and his position of water registrar of the city of Brooklyn ceased and determined. We think it clear that under the decision in the *Tate* case, and by virtue of the provisions of section 1615 of the charter (as amd. *supra*), the office of water registrar was completely abolished on the 1st of January, 1898, so that if the relator is to find protection under section 1543 of the charter (as amd. *supra*) on the ground that he was the head of the bureau, it must appear that he was the chief officer of a division of the department of water supply, gas and electricity, known to the statute which authorized and created the department as a bureau. In other words, the bureau must have been established by law or under its direct authority.

The organization of the fire department provided for in the charter of the city of New York in 1873 (Laws of 1873, chap. 335) was discussed by the Court of Appeals in *People ex rel. Emerick v. Board Fire Comrs. of N. Y.* (86 N. Y. 149). That act (§ 76 *et seq.*) provided for a board of three persons and for three bureaus, and it assigned to the board and to each bureau its peculiar duties. It was there held that the charter did not empower the board of fire commissioners to create another bureau than the ones designated by the act. Section 458 of the charter of 1897 authorized the commissioner of the department of water supply to organize such bureaus as he should from time to time deem necessary to the proper discharge of the duties of his department, and directed that he locate a branch of each of the bureaus so organized in the public hall or building of the borough of Brooklyn for the discharge of all the duties of the department devolving upon such bureau or bureaus, so far as such duties appertain to the borough of Brooklyn. On the 8th day of February, 1898, William Dalton, then commissioner of water supply, pursuant to the authority conferred upon him by that section, established and organized two bureaus of the department of water supply, and only two, and evidenced his action by a written order to that effect, filed with the department and now in the custody and control of the department of water supply, gas and electricity. These two bureaus were, *first*, the bureau of civil engineers, and, *second*, the bureau for the collection of revenue derived from the sale and use of water in the city of New York, the chief officer of which, Commissioner Dalton ordered, should be known as water registrar; and the direction further provided that a branch office of the latter bureau be maintained in the municipal building in the borough of Brooklyn. This direction was so closely in accord with the provisions and requirements of section 458 of the charter of 1897 that it seems to be clear without argument that the Brooklyn office was, in the language of the section, a branch of the bureau so organized by him and located, as the section required, in the public hall or building of the borough of Brooklyn. The head of the bureau was the chief officer thereof, and was known as the water registrar. His subordinate for the branch of the bureau in Brooklyn held the position as water registrar *for the borough of Brooklyn*, and was not, therefore, the head of a bureau. In view

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of the statutory authority vested in the commissioner to establish such bureaus as he might see fit, and in view of the fact that he has established no more than two and made the office, at the head of which the relator was placed, distinctly a branch of one of those bureaus, it cannot be said, in the absence of some further direction in the premises, that under the authority conferred upon the commissioner by section 458 of the charter of 1897, there has been by custom, usage, or in any other way, established any other or further bureau as that term is understood in section 1543 of the charter (as amd. *supra*), the advantage of whose terms the relator seeks.

It follows that the granting of a writ of mandamus in this case, either alternative or peremptory, is improper, and the order appealed from must, therefore, be reversed.

All concurred.

Order allowing alternative writ of mandamus reversed, with ten dollars costs and disbursements, and writ dismissed.

In the Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise of the State of New York, Respondent, for an Order Revoking and Canceling Liquor Tax Certificate No. 10,375, Issued to EMMA L. WATSON, Appellant.

Revocation of liquor tax certificate — if the certificate holder defaults on the return of the order to show cause, the court may order a reference to take proof and report.

Subdivision 2 of section 28 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1908, chap. 486) provides that, upon the presentation of a petition for the revocation of a liquor tax certificate, the court shall make an order requiring the holder of the liquor tax certificate to show cause why the certificate should not be revoked, and that on the return day of the order to show cause, "the justice, judge or court before whom the same is returnable shall grant such order revoking and cancelling the said liquor tax certificate, unless the holder of said liquor tax certificate shall present and file an answer to said petition, which answer denies each and every violation of the Liquor Tax Law alleged in the petition, and raises an issue as to any of the facts material to the granting of such order, in which event the said justice, judge or court shall hear the proofs of the parties and may, if deemed necessary or proper, take testimony in relation to the allegations of the petition or answer,

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or appoint a referee to take proofs in relation thereto, and report the evidence to such justice, judge or court, without opinion."

Held, that instead of revoking the certificate, the court, in the event of the failure of the certificate holder to appear on the return of the order to show cause, might appoint a referee to take proof in relation to the allegations in the petition and to report the evidence to the court without opinion, particularly as the court has power, both inherent and statutory (Code Civ. Proc. § 1015), to order references on motions and special proceedings when it deems them necessary, and has been accustomed to exercise this power for many years;

That an enactment of the Legislature will not be construed as modifying time-honored customs and powers of the court, in the absence of an express provision to that effect therein.

JENKS, J., dissented.

APPEAL by Emma L. Watson from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 17th day of October, 1903, denying the appellant's motion to vacate and set aside an order of reference entered in said clerk's office on the 14th day of September, 1903, and also from an order entered in said clerk's office on the 4th day of November, 1903, revoking and canceling liquor tax certificate No. 10, 375, theretofore issued to the said Emma L. Watson.

Alexander H. Geismar, for the appellant.

Herbert H. Kellogg, for the respondent.

HOOKER, J.:

This is an appeal by the certificate holder, Emma L. Watson, from an order denying a motion to vacate and set aside an order of reference, granted in the proceeding upon the return of the order to show cause, made upon the presentation of a verified petition of the State Commissioner of Excise, demanding a revocation of appellant's liquor tax certificate. The petitioner alleged that he was the duly appointed, qualified and acting State Commissioner of Excise, and, upon information and belief, that on the 30th day of April, 1903, there was presented to the proper deputy commissioner of excise a verified application of the appellant for a liquor tax certificate, upon which was issued to her certificate No. 10,375, permitting her to traffic in liquors at the place therein designated. The petitioner further alleged upon information and belief that on Sunday, the 2d

day of August, 1903, the appellant, personally, and by her agents, servants, bartenders and persons in charge of the premises at the place designated in the certificate, wrongfully and unlawfully committed several distinct violations of the Liquor Tax Law, in illegally selling intoxicating liquors; and further alleged upon information and belief that there were two separate violations of the statute on Sunday, August 9, 1903. The petition also showed the source of the petitioner's information and the grounds of his belief as to the matters therein alleged upon information and belief to be the public records in the office of the State Commissioner of Excise and his special deputy, and the affidavits of Halsey and Rogers, attached to the petition and made a part thereof, as if fully set forth therein. The record contains the affidavits of Halsey and Rogers, wherein the affiants swore upon their positive knowledge to the offenses mentioned in the petition. Upon the presentation of the latter, one of the justices of the Supreme Court made an order requiring the appellant to show cause why her liquor tax certificate should not be revoked and canceled. Upon the return of that order, no appearance was made on behalf of the certificate holder, and upon her default and the motion of the petitioner the Special Term ordered that the matter be referred to a referee to take proof in reference to the allegations in the petition and report the evidence to the court, without opinion, with all convenient speed; and directed that any party to the proceeding might bring the same to a hearing before the referee by notice to the opposite party. Upon the initiative of the State Commissioner of Excise proof was taken before the referee, which is not printed in this record; it is, however, stipulated between the parties that the evidence so taken before the referee was sufficient to justify the order of revocation entered thereupon. Pending the hearing before the referee the appellant appeared specially in the proceeding for the purpose of moving to set aside the order of reference, granted on the 14th day of September, 1903, and thereafter, upon papers showing the status of the proceeding, moved to set aside the reference on the ground that, pursuant to the provisions of subdivision 2 of section 28 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1903, chap. 486), the Special Term of the Supreme Court was without power or jurisdiction to make an order of reference where the certificate holder did not

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appear upon the return of the order to show cause, and claimed that the proper procedure was for the court to have made a summary order upon her default forfeiting, revoking and canceling the liquor tax certificate as a final order in the proceedings. On the 16th day of October, 1903, an order was entered denying the motion to set aside and revoke the order of reference; and from the order of October 16, 1903, and from the final order of cancellation and revocation, the certificate holder has appealed to this court.

Although the appellant did not appear on the motion which resulted in the final order, the commissioner expressly waives the question of her right to appeal from the final order. On the 28th day of October, 1903, the referee having been attended by the attorney for the State Commissioner of Excise, and having taken proof, made his report; later, at Special Term, no one appearing on behalf of the appellant, and upon her default, and upon the reading and filing of all the papers and the report of the referee and the evidence annexed thereto, an order was entered revoking and canceling the certificate.

Subdivision 2 of section 28 of the Liquor Tax Law, as amended (*supra*), after providing for what offenses a liquor tax certificate may be revoked, and permitting a revocation to be accomplished in proceedings had at Special Term, instituted by a proper petitioner, goes on to say: "Upon the presentation of the petition and such consent whenever necessary, the justice, judge or court shall grant an order requiring the holder of such certificate to show cause before him, or before a Special Term of the Supreme Court of the judicial district, on a day specified therein, not more than ten days after the granting thereof, why an order revoking and cancelling such liquor tax certificate should not be granted; and said order shall also contain an injunction restraining the said certificate holder from transferring or surrendering such certificate for rebate, except as is hereinafter provided, until the final determination of the proceeding. A copy of such petition and order shall be served upon the holder of such certificate, and the officer issuing the same, or his successor in office, and upon the State Commissioner of Excise, in the manner directed by such order, not less than five days before the return day thereof. On the day specified in such order, the justice, judge or court before whom the same is returnable shall grant such

order revoking and cancelling the said liquor tax certificate, unless the holder of said liquor tax certificate shall present and file an answer to said petition, which answer denies each and every violation of the Liquor Tax Law alleged in the petition, and raises an issue as to any of the facts material to the granting of such order, in which event the said justice, judge or court shall hear the proofs of the parties and may, if deemed necessary or proper, take testimony in relation to the allegations of the petition or answer, or appoint a referee to take proofs in relation thereto, and report the evidence to such justice, judge or court, without opinion." The balance of said subdivision 2 of section 28 is devoted to provisions which do not seem to be germane to the questions involved upon this appeal.

The exact question, and the only one which is presented for our consideration by the record before us, is as to the power of the court at Special Term, upon the non-appearance of the certificate holder on the return of the order to show cause based upon the original petition, to order a reference to take proof and report without opinion, it being contended by the appellant that such an order is void and that the only course open to the Special Term under such circumstances is defined in the statute we have quoted, and is to make a summary order revoking and canceling the certificate.

The State Commissioner of Excise defends the order appealed from on the ground that the subdivision of the section is not to be construed as mandatory to the extent of depriving the court of its inherent power to order a reference upon motion or upon a hearing in a proceeding of this general character to obtain further advice in relation to the facts set forth in the moving papers; and in this view we are impelled to concur. The procedure in *Matter of Cullinan, Neus Certificate* (41 Misc. Rep. 392), was similar to that employed in this case upon the return of the order to show cause; the certificate holder being in default, the court at Special Term ordered a reference to take proof, and directed that a motion for a final order come on to be heard thereafter upon notice. Upon appeal to the Appellate Division in the first department the order was affirmed, without opinion. (89 App. Div. 613.) The affirmance being without opinion, we are not advised whether the exact question raised by the appeal here was argued or passed upon by that court, but the sustaining of the order made in the *Neus Case* (*supra*)

seems to indicate that the Appellate Division in that department holds the view that the language of the subdivision under review is insufficient to deprive the court of its inherent power to order a reference. It has been the practice of the Supreme Court to direct a reference for the purpose of taking evidence to aid it in disposing of motions and special proceedings for many years. One of the earliest cases upon this subject is that of *Dwight v. St. John* (25 N. Y. 203), in which it was held that outside the provisions of the Code of Procedure the court always had the right to refer to take proofs upon matters upon which it desired fuller information before proceeding. In *Matter of Bohm* (4 Hun, 558), a proceeding to vacate an assessment; in *People ex rel. Del Mar v. St. Louis, etc., Ry. Co.* (44 Hun, 552), a mandamus proceeding, and in *Martin v. Hedges* (45 Hun, 38), a motion to open a default, similar procedure was indulged, and it was held that this power was inherent in the court. Section 1015 of the Code of Civil Procedure, which incorporates the provision of subdivision 2 of section 271 of the Code of Procedure, is broad in its terms, confirms the inherent power in the court and endows it with statutory authority. That section reads as follows: "The court may likewise, of its own motion, or upon the application of either party, without the consent of the other, direct a reference to take an account and report to the court thereon, either with or without the testimony, * * * or where it is necessary to do so for the information of the court."

In view of the ancient practice of the court to order references when deemed necessary, the inherent power to do so, which it has been frequently held it possessed, and the broad and comprehensive terms of section 1015 of the Code of Civil Procedure, we are unable to say that the Legislature intended in the enactment of subdivision 2 of section 28 of the Liquor Tax Law (as amd. by Laws of 1903, chap. 486) to deprive the court in proceedings of this character of the power it has always possessed in motions and other similar proceedings. It is true that the language of the subdivision of the section seems to indicate that the justice, court or judge before whom the order to show cause is returnable shall make an order revoking and canceling a certificate unless its holder presents an answer which raises a material issue. This language is not

so far mandatory as to deprive the court of the privilege of taking proof, either itself or by reference, of the facts alleged in the petition, nor is the language framed with the intent of curtailing the power to refer. An enactment of the Legislature will not be construed as modifying the time-honored customs and powers of the court, *in the absence of explicit provision to that effect therein.*

The court was not without jurisdiction in granting the order of reference, or in making the order revoking and canceling the certificate upon the coming in of the referee's report; and the orders appealed from should, therefore, be affirmed, with costs.

All concurred, except JENKS, J., dissenting.

Orders affirmed, with ten dollars costs and disbursements.

COSTANTINO MAGLIO, Respondent, v. THE NEW YORK HERALD COMPANY, Appellant.

Libel — where it refers to a hotel and not to the proprietor a complaint must allege special damages.

A newspaper article stating that a hotel was frequented by vicious characters; that it had a bad reputation; that an unsuccessful attempt had been made to close it, and that the physician who performed an autopsy on a murdered woman believed that the murderer would be found in such hotel, refers to the hotel and not to the hotel proprietor.

Consequently, the complaint in an action of libel brought against the publisher of such article by the hotel proprietor does not state facts sufficient to constitute a cause of action unless it alleges special damage.

APPEAL by the defendant, The New York Herald Company, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 9th day of October, 1903, upon the decision of the court, rendered after a trial at the Westchester Special Term, overruling the defendant's demurrer to the plaintiff's complaint.

The action was brought by the plaintiff, for many years the proprietor of a hotel at White Plains, Westchester county, N. Y., known as the Roma Hotel, to recover damages alleged to have been

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sustained by reason of the publication of two alleged libels, one in the New York *Herald*, and one in the *Evening Telegram*, two newspapers published by the defendant. One of the alleged libels, which was published in the New York *Herald* on January 24, 1902, was as follows:

“WOMAN FOUND BY THE ROADSIDE, FOULLY SLAIN, MET THE FATE THAT WAS INTENDED FOR HER DAUGHTER.

“When the family fortune fell lower than usual a few months ago the daughter, Isabella, took service as a nurse girl in a family living about four blocks from her home. She was often on the street as late as six o'clock in the evening and at such times attracted the attention of passers by, though it is said that she is of a modest and retiring nature. Further down Lake street is the Roma Hotel, kept by Costantino Maglio. (The plaintiff meaning.) Many Italians make the hotel their headquarters and it has a bad reputation. An attempt was recently made to have it closed, but the attempt failed. From this hotel, a tall Italian, whose name is not known, on more than one occasion followed Miss Allen. He attempted to speak to her and was repulsed. Once he sprang out at her from the side of the street just before she entered her home. Her screams brought her father to her assistance and the Italian disappeared. To-day Miss Allen accompanied a reporter for the *Herald* to the Roma Hotel, she was unable to identify her assailant. * * * Suspicion points with emphasis in the direction of an Italian. Not far from where Mrs. Allen's body was found is a hotel (meaning the Roma Hotel, kept by the plaintiff as aforesaid), patronized by Italians, and it is the opinion of Dr. Curtiss that the murderer will be found there. There is good reason to believe that a mistake was made when the crime was committed, and that Mrs. Allen's daughter, Isabella, was intended as the victim. The girl, who is in a state of hysterical fear as a result of the terrible tragedy that has come into her life, is of the opinion that she escaped death by the merest accident, and that her mother was sacrificed in her stead. Less than a month ago Miss Allen was followed to the door of her home by an Italian who attempted to intercept her.”

The other alleged libel was published in the *Evening Telegram* on January 24, 1902, and was as follows:

"RETREAT FOR THE VICIOUS (meaning thereby that the Roma Hotel, of which the plaintiff was keeper, as aforesaid, secreted and harbored and was the home of vicious persons and criminals.) HUSBAND OF SLAIN WOMAN FREED.

"Police now seek other clews. Mrs. Allen found murdered by roadside in White Plains, N. Y., is believed to have met fate intended for her daughter, who had twice been threatened by Italian who cannot be found. Isabella (meaning the daughter of the said Mrs. Allen) is employed as a nurse girl in the family living about four blocks from her home. She was often on the street as late as six o'clock in the evening, and at such times attracted the attention of passers by, though it is said that she is of a modest and retiring nature. Further down Lake street is the Roma Hotel, kept by Costantino Maglio (the plaintiff meaning). Many Italians make the hotel their headquarters, and it has a bad reputation. An attempt was recently made to have it closed, but the attempt failed. From this hotel a tall Italian, whose name is not known, on more than one occasion followed Miss Allen; he attempted to speak to her and was repulsed. Once he sprang out at her from the side of the street just before she entered her home. Her screams brought her father to her assistance and the Italian disappeared. When taken to the Roma Hotel yesterday, however, Miss Allen was unable to identify her assailant. * * *

"WHITE PLAINS, N. Y., Friday. Strenuous efforts on the part of the police to discover the murderer of Isabella Allen, whose body was found under such shocking and peculiar circumstances Thursday night, have so far been unavailing. James Allen, her husband, who was arrested on suspicion, has been released, and the police are now trying to find the man who notified Mr. Allen of the discovery of his wife's body, went with him to the police station to report the matter and then mysteriously disappeared. Suspicion points with emphasis in the direction of an Italian. Not far from where Mrs. Allen's body was found is a hotel patronized by Italians (meaning the Roma Hotel kept by plaintiff as aforesaid), and it is the opinion of Dr. Curtiss, who performed the autopsy, that the murderer will be found there. There are good reasons for believing that a mistake was made when the crime was committed, and that Mrs. Allen's daughter Isabella was intended as the victim. The girl, who is in a

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state of hysterical fear as a result of the terrible tragedy that has come into her life, is of the opinion that she escaped death by the merest accident and that her mother was sacrificed in her stead."

Robert W. Candler [*William Jay* and *Flamen B. Candler* with him on the brief], for the appellant.

Charles A. Dryer, for the respondent.

PER CURIAM:

The alleged libels for the publication of which this action is brought do not differ materially from those which were under consideration in *Maglio v. New York Herald Co.* (83 App. Div. 44). It seems to us that they refer to the property of the plaintiff and not to the plaintiff individually. Here, however, there is no allegation of special damage, and without such an allegation, where the defamatory publication is a libel on the place and not on the plaintiff, the complaint does not state facts sufficient to constitute a cause of action. (*Kennedy v. Press Publishing Co.*, 41 Hun, 422.)

It follows that the interlocutory judgment should be reversed.

All concurred.

Interlocutory judgment reversed, with costs, and demurrer sustained, with costs.

WALTER POWLES, Appellant, v. PEARSON HALSTEAD and Others, Respondents.

Negligence—the act of backing one truck against another and thereby crushing a man between the latter and some boxes is evidence of negligence—the credibility of the truckman is to be determined by the jury.

Upon the trial of an action to recover damages for personal injuries, the plaintiff gave evidence tending to show that, while he was standing on a pier behind a one-horse truck which he was assisting in unloading, a large double truck belonging to the defendant was backed against the plaintiff's truck with such force as to break the shafts of the latter truck, throw down the horse attached thereto, and crush the plaintiff between the truck and some boxes which were standing about three feet distant therefrom.

Evidence was also given tending to show that the plaintiff's horse was standing quietly at the time, and that the collision was the result of an effort on the part of the defendant's driver to turn or back his truck upon the pier.

The accident occurred in the daytime, and no claim was made that there was not ample room for both trucks, or that the defendant's driver was prevented in any manner from seeing what he was doing.

Held, that the case should have been submitted to the jury, and that it was error for the court to dismiss the plaintiff's complaint at the close of the evidence on the ground that there was no evidence of the defendant's negligence which would warrant the submission of the case to the jury;

That the credibility of the defendant's driver was a matter for the consideration of the jury.

APPEAL by the plaintiff, Walter Powles, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 20th day of June, 1902, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term.

James C. Cropsey, for the appellant.

John Ford, for the respondents.

HIRSCHBERG, P. J.:

The plaintiff was injured in the daytime, while standing on the pier of Mallory & Co., East river, in the borough of Manhattan, behind a one-horse truck belonging to Charles Burke, which he, the plaintiff, was assisting Burke in unloading. There was evidence tending to establish that his injuries were occasioned by the backing against his truck of a large double truck belonging to the defendants and in charge of one of their drivers. The collision was of such force as to break the shafts of the truck which the plaintiff was unloading, to throw down the horse which was harnessed to that truck, and to crush the plaintiff between the truck and some boxes which were piled up about three feet distant. There was evidence tending to establish further that at the time of the collision the horse attached to the plaintiff's truck was standing still.

The learned trial justice dismissed the complaint at the close of the case on the ground that there was no evidence of defendants' negligence which would warrant a submission of the question to the jury, saying to the plaintiff's counsel, "I think you must show some act on the part of the driver that was reckless or negligent, or wanton or wrong in some way, and I do not see that you have shown any." There being evidence from which the jury might

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have reasonably inferred that the plaintiff's horse was standing quietly at the time, and that the collision was consequently the result of an effort on the part of the defendants' driver to turn or back his truck upon the dock, it was a question of fact whether that result could not have been accomplished in the exercise of ordinary care without the violent contact which ensued. No claim was made that there was not ample room for both trucks, or that the defendants' driver was prevented in any manner from seeing what he was doing. Indeed, that driver presented his version of the occurrence, and assuming that the event as he described it was not a physical impossibility, it certainly raised a clear issue of fact. The plaintiff's truck was standing east and west, the horse facing westerly, with the truck backed towards the river or easterly end of the pier. The defendants' driver drove upon the dock from the shore end, and when he reached the neighborhood of the river he endeavored to turn his horses for the purpose of backing up alongside of the other truck. He testified "as I turned around trying to back to Mr. Burke's truck, backing up—as I was turning around I hollered 'Hey there!' and the horse backed down, and his truck got into mine and crushed alongside of the dock, and I stopped my horse as quick as I could. * * * While I was backing in, Burke's truck backed up in my way, and I hollered 'Hey there!' as I was swinging around trying to back in. His truck hit mine. The two trucks collided. Burke's truck was standing into the river and the horses standing to the shore like—the horse was west and the truck was east; that is, the truck was backed up and the horses swung to one side, right alongside of the dock. Just before the accident my truck was just the same thing. * * * When I was backing up Mr. Burke's horse backed up and backed into my truck and the two trucks came together. I was looking back all the time. Burke's horse was standing still when I started to back up. Up to that time I hadn't stopped at all. I was trying to get in. I was swinging in to get in position, and Mr. Burke's horse backed up." It is not very clear how under the circumstances the horse attached to the truck which the plaintiff was unloading could have backed that truck against the defendants' truck, but even if the statement of the witness was such as was calculated, if accepted, to exculpate him from the blame and consequent liability with which

he would otherwise be chargeable, his credibility was a matter for the consideration of the jury.

That the case should have been submitted to the jury for determination has been often decided in controversies involving somewhat similar conditions. (See *Murphy v. Weidmann Cooperage*, 1 App. Div. 283; *Smith v. Bailey*, 14 id. 283, 285; *Nead v. Roscoe Lumber Co.*, 54 id. 621; *Curley v. Electric Vehicle Co.*, 68 id. 18; *Steinacker v. Hills Brothers Co.*, 91 id. 521; *Kettle v. Turl*, 162 N. Y. 255.)

The judgment should be reversed.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

In the Matter of the Appeal of GUSTAVUS A. ROGERS, the Defendant's Attorney in the Case of ISRAEL POMERANZ, Plaintiff, v. LOUIS MARCUS, Defendant.

GUSTAVUS A. ROGERS, Appellant, v. ISRAEL POMERANZ and LOUIS MARCUS, Respondents.

Attorney and client — when a settlement of an action by a client will not be carried out by the court — marking a case as settled is a discontinuance.

The right of the parties to an action to settle the litigation does not require the court to carry into effect a settlement made for the purpose of depriving the defendant's attorney of his costs.

In such a case a discontinuance of the action will be refused except upon terms which will protect the attorney.

The action of a trial judge in marking a case settled is equivalent to a discontinuance of the action.

APPEAL by Gustavus A. Rogers, the defendant's attorney in the first above-entitled action and the plaintiff in the second above-entitled action, from an order of the Supreme Court in the former action, made at the Kings County Trial Term and entered in the office of the clerk of the county of Kings on the 16th day of April, 1903, denying a motion made by the said Gustavus A. Rogers to restore that case to the day calendar "for the purpose of protecting the

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rights of the defendant's attorney herein, and for the purpose of determining his right to the taxable costs of this action."

Gustavus A. Rogers, appellant, in person.

Maxwell G. Cohen, for the respondent Pomeranz.

WILLARD BARTLETT, J.:

This case was before the Appellate Division in July last, when the appeal was dismissed because the attorney who claimed to be aggrieved by the order appealed from was not the appellant. (*Pomeranz v. Marcus*, 86 App. Div. 321.) The attorney has now appealed, and we think that he is entitled to a reversal of the order upon the authority of the case of *National Exhibition Co. v. Crane* (167 N. Y. 505). The allegation in the moving affidavit, that the settlement between the parties was collusive for the purpose of defrauding the defendant's attorney of his costs, was not denied. As was said on the previous appeal, the action of the trial judge in marking the case settled was equivalent to a discontinuance of the action. In view of the uncontradicted allegation that the settlement was collusive and fraudulent, a discontinuance should not have been granted without protecting the defendant's attorney. We do not question the right of parties to settle their cases, which is so strongly asserted by the learned trial judge in his opinion; but under the doctrine of the *Crane* case, above cited, this right does not extend so far as to compel the court to carry the settlement of a litigation into effect where it is made for the purpose of depriving an attorney of his costs.

The order appealed from should be reversed and the case restored to the calendar at Trial Term. When it is duly called for trial, if the parties show the court that a settlement has been effected without collusion for the purpose of depriving the defendant's attorney of his costs, they will be entitled to an order of discontinuance. If, on the other hand, it appears that the settlement was collusive and fraudulent, a discontinuance may be refused, except upon terms which will protect the attorney for the defendant.

All concurred.

Order reversed, with ten dollars costs and disbursements.

AUGUST G. FRITSCH, as Administrator, etc., of GEORGE FRITSCH, Deceased, Respondent, v. NEW YORK AND QUEENS COUNTY RAILWAY COMPANY, Appellant.

Negligence—death of a boy struck by a street car having no fender—obligation of the company to have fenders on its cars, considered.

On the trial of an action to recover damages resulting from the death of the plaintiff's intestate, a boy seven and a half years of age, who was run down and killed by one of the defendant's street cars, the jury may properly find that the age of the child was such that he was not chargeable with contributory negligence.

It appeared that the car in question was not provided with a fender; that the accident occurred in the borough of Queens, while the car was running at a speed of twenty miles an hour, and that there was no ordinance in force applicable to the locality requiring street cars to be provided with fenders. A witness for the plaintiff testified, without objection, that he had seen fenders on other cars in New York, Brooklyn and Jamaica for about four years, and that fenders were in general use.

Subsequently the defendant objected to the admission of testimony regarding the use of fenders, but the objection was overruled.

At the conclusion of the charge, the defendant's counsel asked the trial judge to charge "that absence of fenders on the cars of the defendant cannot be considered as negligence or a want of care or prudence."

The court responded as follows: "That I decline, because they may consider the equipment of the car, in connection with the speed at which it was running and all the other things belonging to the use of such a car, as part of the paraphernalia and surroundings and equipment that go to make up the particular car with which the accident happened."

Held, that where a jury is satisfied from the evidence that the injury would have been prevented by the use of a safeguard, such as a fender, which is usually attached to cars of similar construction, operated in similar localities generally throughout the country, and which has proved ordinarily efficacious for the protection of persons upon the highway, they are entitled to predicate negligence upon the omission to provide the cars with such safeguards.;

That the jury could not have been misled by the ruling of the trial judge upon the defendant's request to charge, and that a judgment entered upon a verdict in favor of the plaintiff should be affirmed.

Sembler, that it was proper to permit proof of the fact that the car in question was not provided with a fender.

That the presence or absence of a fender had no place in the case as a foundation upon which the jury might rest a charge of negligence against the defendant in the operation or construction of the car. It simply bore upon the question as to the extent of the injury (per WOODWARD, J.).

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APPEAL by the defendant, the New York and Queens County Railway Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 20th day of April, 1903, upon the verdict of a jury for \$2,500, and also from an order entered in said clerk's office on the 19th day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

George F. Hickey [William E. Stewart with him on the brief], for the appellant.

S. S. Whitehouse, for the respondent.

WILLARD BARTLETT, J.:

This is an action to recover damages for the negligent killing of the plaintiff's son, a boy seven and one-half years of age, who was run down by one of the defendant's electric cars upon a street crossing in Astoria, in the borough of Queens. There was evidence from which the jury could find that the motorman ought to have seen the boy in season to avoid injuring him, and that the motorman, who was running his car at a speed of twenty miles an hour, was looking to the side instead of to the front of the car at the time of the accident. The age of the child was such that the jury were at liberty to find that he was not chargeable with contributory negligence. (*Stone v. Dry Dock, etc., R. R. Co.*, 115 N. Y. 104.)

It does not appear that there was any municipal ordinance in force applicable to the locality where this accident occurred, requiring street cars running therein to be provided with fenders; and, as matter of fact, there was no fender upon this car. The only serious question which arises on this appeal relates to the reception of evidence tending to show that fenders were in common use upon street cars in other parts of the city of New York and in other cities, and the refusal of the learned trial judge to charge, as requested by the defendant, that the absence of fenders on the cars of the defendant could not be considered as negligence or a want of care and prudence.

I think there can be no doubt that it was proper to admit evidence of the fact that there was no fender on this particular car. Indeed, this proof was introduced without objection. In *Oldfield*

v. *New York & Harlem R. R. Co.* (14 N. Y. 310, 320) the plaintiff's intestate, a girl about seven years of age, was run down and killed by a car drawn by four horses on a street in the city of New York. Upon the trial evidence was received to show that there were no guards in front of the wheels of the car, although nothing was said about the absence of such guards in the complaint, which merely charged that the car was driven over the child carelessly and negligently by the servant of the defendants. Upon an appeal to the Court of Appeals that tribunal affirmed a judgment in favor of the plaintiff, notwithstanding the admission of this evidence. One of the opinions was written by COMSTOCK, J., who said that in respect to the proof of the absence of guards he concurred in the observations of Mr. Justice WOODRUFF, in the Court of Common Pleas for the city and county of New York (3 E. D. Smith, 103, 110), who thought the evidence admissible on the ground that what would be prudent and careful in the management of a well-constructed car, provided with brakes and guards to prevent injury in case of accident, might be imprudent and careless in driving a car not thus provided.

In regard to the use of fenders on other cars, a witness for the plaintiff testified, without objection, that he had seen them on other cars in New York and Brooklyn and Jamaica for about four years, and that these fenders were in general use. He was then questioned and answered as follows: "Q. Were they in general use on other roads? [Objected to as incompetent, irrelevant and immaterial; objection overruled; exception.] A. Yes, sir. Q. Had you seen them on street cars in other cities? [Same objection, ruling and exception.] A. Yes, sir. Q. What other city? A. New York, Louisville. The court: We won't take Louisville, strike that out. Q. In New York city and Brooklyn? A. Yes, sir." The witness then went on to testify, without objection, that he had never seen a fender on a car in Queens county, and that he had ridden over other roads, including the Brooklyn Heights in Queens county, the road that goes from Brooklyn to Jamaica, and that they used fenders on those cars and always had. Another witness for the plaintiff, who had been a motorman for ten or twelve years on different lines in different cities, testified that he had observed the cars in Brooklyn and Queens county and New York. He was then asked: "During the last ten years, tell us whether or not fenders have been in gen-

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eral use on such cars? [Objected to as incompetent, irrelevant and immaterial; objection overruled; exception.] A. Yes, excepting one corporation that does not use them that I know of. Q. New York and Queens County? A. Yes, sir, and Broadway Road, New York. Q. Do you know what the purpose of these fenders is? [Objected to as incompetent, irrelevant and immaterial; objection overruled; exception.] A. They are to prevent accidents to pedestrians and children and people. Life savers, to prevent accidents to people. They have been in general use on the roads in Kings County and in New York County, for the last ten years."

After the learned trial judge concluded his principal charge to the jury, the counsel for the defendant asked him to charge, "that absence of fenders on the cars of the defendant cannot be considered as negligence or a want of care or prudence." To this request the court responded as follows: "That I decline, because they may consider the equipment of the car in connection with the speed at which it was running and all the other things belonging to the use of such a car as part of the paraphernalia and surroundings and equipment that go to make up the particular car with which the accident happened." To this refusal to charge as requested and to the modification the counsel for the defendant duly excepted.

It cannot be regarded as yet definitely settled by authority in this State to what extent street railroad companies are obliged, in the absence of statute or ordinance on the subject, to adopt safeguards against injuring persons upon the highway likely to arise out of their want of care in the operation of their cars. Judge Seymour D. Thompson, in his careful and very complete treatise on the Law of Negligence, says that the use of fenders, pilots, or safety-guards in front of street cars to minimize the danger to pedestrians who are run against by the cars, is a modern device, which street railway companies have been compelled to adopt by statutes and municipal ordinances. "At the same time," he adds, "these appliances have not proved as effectual for the protection of pedestrians as was expected, and are still regarded by some as of doubtful utility. While these devices were in an experimental stage it was clearly not negligence *per se* for a street railway company to fail to adopt them, unless required to do so by statute or ordinance." (2 Thomp. Neg. [2d ed.] § 1393.) The case of *Platt v. Albany Railway* (170

N. Y. 115) throws no light on the subject, because there it appeared that there was an ordinance requiring the use of fenders as soon as an approved pattern had been adopted by the common council; and the only ground on which the defendant railway company could be held negligent was that they had not acted speedily enough in procuring the prescribed pattern after the common council had acted.

In *Buente v. P., A. & M. Traction Co.* (2 Penn. Super. Ct. 185), which was an action against a street railway company, decided in 1896, the Superior Court of Pennsylvania said: "The general rule, equally applicable to spark arresters, pilots, fenders, and other devices intended to promote the safety of persons and property, whether used on steam or street railways, is briefly stated in *Henderson v. Railway Company* (144 Pa. 461), as follows: 'It is the duty of railway companies to adopt the best precautions against danger in general use, and which experience has shown to be superior and effectual, and to avail themselves of every such known safeguard, or generally approved invention, to lessen the danger.'" The decision cited asserts a more stringent rule than was applied to the defendant by the learned trial judge in the case at bar. It declares it to be the duty of railway companies to adopt the best precautions against danger in general use, whereas the jury in the present case were instructed that the defendant was only required to use such safeguards as had generally been adopted on similar railways. I quote the language of the charge on this subject, to which no exception was taken: "Again, the proposition of law obtains that while a railroad company is not bound to adopt any untried appliance or to use every possible contrivance which the highest skill might suggest, yet it is guilty of negligence if it fails to use reasonable care, after reasonable time is afforded to do so, to equip the cars on its road with safety appliances in general, practical use on similar railways, provided such negligence causes the accident."

On the whole, I think the correct view is where a jury is satisfied from the evidence that the injury would have been prevented by the use of a safeguard, such as a fender, which is usually attached to cars of similar construction, operated in similar localities generally throughout the country, and which has proved ordinarily efficacious for the protection of persons upon the highway, they are

entitled to predicate negligence upon the omission to provide the cars with such safeguards. But it is doubtful whether the record in this case really raises any question as to the applicability of this doctrine, assuming it to be sound in law. As has already been pointed out, the use of fenders on other lines in Greater New York and other localities had been proved without objection before any exception was taken by the defendant, and the learned trial judge, in what he said in response to the request of defendant's counsel for further instructions on the subject, indicated that the jury were to consider the absence of a fender on the particular car which caused the accident only in connection with the management of the car at the time when the plaintiff's child was killed. In my opinion, the jury could not have been misled by any evidence or instruction in the case on the subject of fenders, and I think, therefore, that the judgment should be affirmed.

WOODWARD, J., concurred in separate memorandum.

WOODWARD, J. (concurring):

I reach the same conclusion as that of Mr. Justice BARTLETT, because I am persuaded that the record in this case does not raise the questions presented upon defendant's brief in reference to the evidence respecting the use of a fender upon the car producing the injury. The rule was laid down in *Steinweg v. Erie Railway* (43 N. Y. 123, 126) that the defendant "was guilty of negligence, if it adopted not the most approved modes of construction and machinery in known use, in the business, and the best precautions in known practical use for securing safety. If there was known and in use any apparatus which, applied to an engine, would enable it to consume its own sparks, and thus prevent the emission of them, to the consequent ignition of combustible property in the appellant's charge, it was negligent, if it did not avail itself of such apparatus. But it was not bound to use every possible prevention which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction," and this rule has been recognized and applied in various cases, involving damages from sparks emitted by locomotives and producing fires upon adjacent premises. (*Babcock v. Fitchburg R. R. Co.*, 67 Hun, 469, 471, reversed upon another point, without criticism of the rule, 140 N. Y. 308; see dis-

senting opinion by O'BRIEN, J., at pp. 318, 319, and authorities there cited.) It is true, of course, that fenders have been used in some cities by reason of ordinances prescribing their use, and it is admitted that their use has been disappointing, and that they have not accomplished all that was expected of them. There is no evidence in this case that they have ever been used as the result of practical experience, demonstrating their greater safety, and the mere fact that they have been in use in New York and Brooklyn, under the provisions of ordinances, does not warrant a jury in finding that it was negligent for this defendant to operate its cars upon a suburban line without fenders. To make the evidence at all relevant in this action, it was necessary at least to show that a car with a fender was safer and that plaintiff's intestate would have been less liable to have been injured had there been a fender (*Babcock v. Fitchburg R. R. Co.*, 140 N. Y. 308, 312), but no such evidence was produced, and the jury were permitted to consider the evidence upon the theory that it had some bearing upon the question of defendant's negligence. It is entirely obvious from the evidence in this case that the question of the presence or absence of a fender was of no possible consequence, unless it be to permit the jury to speculate as to the relative injuries which might have resulted. The weight of evidence is that the car was running at the rate of twenty miles an hour, that the plaintiff's intestate stepped upon the track within a few feet of the car, and that it struck him before the speed had been reduced at all, or practically so. Traveling at this rate it could make little difference to the boy whether there was a fender or not. The fender had nothing to do with the control of the car; its only purpose was to minimize the results of an accident, and whether the plaintiff's intestate was killed or merely injured had no relation to the question of defendant's liability — to the question of its negligence. The question at issue is not whether the boy might have been less injured, but whether the defendant was negligent in the operation of its car, and whether the car carried a fender or not had no bearing whatever upon this issue. If the defendant had seasonably objected to this testimony, and preserved its rights by an exception, or if it had excepted to the charge of the learned trial justice, I should have been disposed to hold that there was reversible error in this case.

If the fender was designed for controlling the car ; if it was in the nature of a brake or emergency appliance, intended to stop the car upon short notice, and the evidence had tended to show that it was an appliance which common use had approved, and there had been evidence to show that with its use the car might have been stopped in time to avert the accident, it would constitute a proper element in the case ; but to hold that the defendant may be charged with negligence for not using an appliance which is merely intended to mitigate the results of an accident, where there is no evidence to show even that this result might have been accomplished, is carrying the doctrine of liability beyond any point sanctioned by authority. Under the plaintiff's theory and evidence, the boy would have been hit by this car whether equipped with a fender or not ; if the car was running at twenty miles an hour he must, inevitably, have been seriously injured, if not killed, and the extent of the injuries has no bearing whatever upon the question of the defendant's negligence in so operating the car that it came in contact with the plaintiff's intestate. The extent of the injuries determines the measure of damages and the character of action, but not the primary question of actionable negligence ; that depends upon the degree of care used in the operation of the car under the circumstances surrounding the accident. The defendant, being liable for the contact with the boy, the absence of the fender, assuming that it would have lessened the injuries, simply imposes a different measure of damages than that which would have otherwise prevailed. In other words, I do not think a fender is such an appliance as goes to the question of negligence, but is merely designed for the purpose of lessening the liability in the event of an accident, and as such it has no place in the case as a foundation for the jury to predicate negligence in the operation or construction of the car.

Judgment and order unanimously affirmed, with costs, upon the opinion of BARTLETT, J.

INTERNATIONAL HIDE AND SKIN COMPANY, Appellant, v. NEW YORK DOCK COMPANY, Respondent.

New York city — charge for the use of a wharf for the first twenty-four hours — implied contract.

Section 862 of the revised Greater New York charter (*Laws of 1901, chap. 466*), which provides: "It shall be lawful for the owners or lessees of any pier, wharf, or bulkhead within The City of New York, to charge and collect the sum of five cents per ton on all goods, merchandise and materials remaining on the pier, wharf or bulkhead owned or leased by him, for every day after the expiration of twenty-four hours from the time such goods, merchandise and materials shall have been left or deposited on such pier, wharf or bulkhead, and the same shall be a lien thereon," does not prevent wharfingers from entering into special contracts for the use of their wharves for the first twenty-four hours.

If no special contract is made, the wharfinger is entitled to recover upon an implied contract the reasonable value of the use of his wharf during such first twenty-four hours.

APPEAL by the plaintiff, the International Hide and Skin Company, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendant, entered on the 25th day of November, 1903, sustaining the defendant's demurrer to the plaintiff's complaint.

Joseph Fitch [Joseph R. Swan with him on the brief], for the appellant.

Charles E. Hotchkiss [Julien T. Davies, Jr., and Ward W. Pickard with him on the brief], for the respondent.

WILLARD BARTLETT, J.:

This action is brought to recover the amount of certain charges which the defendant compelled the plaintiff to pay for the occupation of the defendant's wharf by the plaintiff's goods for a period of less than twenty-four hours. The demurrer raises the question whether under section 862 of the revised Greater New York charter (*Laws of 1901, chap. 466*) an owner or a lessee of a wharf in the city of New York is prohibited from collecting any compensation for the occupation of such wharf by merchandise landed thereon from a vessel and left there, until after the expiration of twenty-four hours from the time when the goods are thus landed.

The revised charter provision cited is as follows: "It shall be law-

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ful for the owners or lessees of any pier, wharf, or bulkhead within The City of New York, to charge and collect the sum of five cents per ton on all goods, merchandise, and materials remaining on the pier, wharf, or bulkhead owned or leased by him, for every day after the expiration of twenty-four hours from the time such goods, merchandise and materials shall have been left or deposited on such pier, wharf, or bulkhead, and the same shall be a lien thereon."

I think that the question presented by this demurrer must be deemed settled in favor of the defendant by the decision of the Court of Appeals in the case of *Woodruff v. Havemeyer* (106 N. Y. 129), where the court had under consideration section 2 of chapter 320 of the Laws of 1872, the provisions of which are now found in section 862 of the revised Greater New York charter. It was pointed out that the enactment "does not in terms prohibit wharfingers from entering into special contracts for the use of their wharves for the storage or deposit of goods thereon during the first twenty-four hours," and it was expressly declared that the statute could not be construed "to prohibit the owner of a private wharf from entering into a contract for the landing and deposit of goods upon his wharf upon such terms as may be agreed upon between himself and the owner of the goods, nor can it be construed as requiring him to store goods for any period of time without compensation." From the last proposition, it follows that when a wharf in the city of New York is used for less than twenty-four hours for the deposit of merchandise, and there is no express agreement as to the measure of compensation, "the contract is implied and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred." (See *Ex parte Easton*, 95 U. S. 68.)

From the facts stated in the complaint the existence of such a contract must be inferred, and there is no allegation that the charges which the defendant required the plaintiff to pay were unreasonable in amount.

The complaint does not state a cause of action, and the demurrer was properly sustained.

All concurred.

Judgment of the Municipal Court affirmed, with costs.

SIMON J. HARDING, Respondent, *v.* HENRY W. AUSTIN, Appellant.

Landlord and tenant — clause making the tenant liable in case he vacates the premises for any deficiency arising on the reletting of the property, construed.

A lease for one year from October 1, 1902, provided that the rent should be paid monthly in advance on the first day of each month during the term. It also provided "That in case of default in any of the Covenants, the Landlord may resume possession of the premises, and relet the same for the remainder of the term, at the best rent that _____ can obtain for account of the Tenant, who shall make good any deficiency."

The tenant moved out of the premises on July 1, 1903, without paying the rent due on that day. On September 1, 1903, the landlord relet the premises.

Held, that as the rent payable July 1, 1903, had become due before the landlord re-entered, the landlord's right to recover such rent was not affected by the re-entry clause;

semble, that as the re-entry clause did not provide for the monthly ascertainment or payment of any deficiency arising upon the reletting of the premises, the landlord would not be entitled to recover any portion of such deficiency until the entire amount of such deficiency was ascertained, *i. e.*, until the expiration of the term of the lease.

APPEAL by the defendant, Henry W. Austin, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the plaintiff, entered on the 25th day of September, 1903.

C. E. Sutherland, for the appellant.

Harrison C. Glore, for the respondent.

WILLARD BARTLETT, J.:

This is an action for rent. The complaint set out the execution of a lease between the parties whereby the plaintiff rented to the defendant an apartment in the borough of Brooklyn for three hundred and twenty-four dollars a year, payable in equal monthly payments of twenty-seven dollars each in advance on the first day of each and every month during the term of the letting, which was one year from October 1, 1902. It further alleged that on July 1, 1903, the sum of twenty-seven dollars became due and payable under such lease for rent from that date until the first of August following; and that no part of such sum had been paid. Judgment therefor was accordingly demanded. The answer pleaded (1)

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a surrender of the premises and the acceptance of such surrender by the plaintiff on or about July 1, 1903; (2) that under a defeasance clause contained in the lease no rent was due or payable unless it appeared that there was a deficiency, which could not be ascertained until the end of the term; and (3) that the defendant was induced to enter into the lease by false representations in regard to the character of the premises.

The plaintiff has recovered judgment for the twenty-seven dollars rent which was payable in advance under the terms of the lease on July 1, 1903.

The proof did not sustain either the first or third defense set up in the answer. The only important question raised upon the trial or presented by this appeal relates to the effect of the 6th covenant in the lease, which reads as follows: "That in case of default in any of the Covenants, the Landlord may resume possession of the premises, and re-let the same for the remainder of the term, at the best rent that can obtain for account of the Tenant, who shall make good any deficiency, and any notice in writing, of intention to re-enter, as provided for in the third section of an act entitled 'An act to Abolish Distress for Rent, and for other purposes,' passed May 13th, 1846,* is expressly waived."

The defendant moved out of the premises on July 1, 1903, and the plaintiff, on the first of the September following, two months after the defendant had left, and one month before the expiration of the lease, relet the apartment. It is contended in behalf of the defendant that this conduct on the part of the plaintiff precludes him from maintaining any action upon the lease until the expiration of the term. This position is not tenable, so far as the rent payable in advance July 1, 1903, is concerned. This rent had become due before the plaintiff re-entered the premises and while the lease was in full force, and the right to recover the amount is in no wise affected by the plaintiff's subsequent entry under the defeasance clause. (*McCready v. Lindenborn*, 172 N. Y. 400, 406.) That re-entry put an end to the relation of landlord and tenant. In the case cited the defeasance clause authorized the lessor to relet the premises and required the lessee to pay any deficiency in equal

* See Laws of 1846, chap. 274, § 8, now contained in Code Civ. Proc. § 1505.—
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monthly payments as the amount thereof should be ascertained from month to month; and it was held by the Court of Appeals that while under this contract no further rent as such could accrue, a separate and independent cause of action arose every month when a deficiency had been ascertained in the manner provided. There is no provision for the monthly ascertainment of any deficiency or the monthly payment thereof in the lease under consideration in the case at bar, and it would seem, therefore, that the enforcement of any right of action against the lessee for such deficiency as there might be upon the reletting of the premises by the landlord under the defeasance clause would have to be postponed until the amount of such deficiency was ascertained at the end of the term fixed by the lease. But however this may be, the judgment, which is only for the July rent and not for any deficiency, is right and should be affirmed.

All concurred.

Judgment of the Municipal Court affirmed, with costs.

MARTIN F. BURNS, Respondent, v. BORDEN's CONDENSED MILK COMPANY, Appellant.

Evidence — declarations of an agent made after the event — statement by the driver of a wagon that he had smashed the wagon of another is not competent evidence thereof in an action by such other party.

In an action brought against the Borden's Condensed Milk Company to recover damages for injuries to the plaintiff's buggy, the plaintiff testified that he left his horse and buggy in the street and entered a house and that, upon returning, he found the buggy overturned and injured; that a wagon bearing the sign "Borden's Condensed Milk" was standing near by and that a person, who said he was the driver, told him that his vehicle was a Borden's condensed milk wagon and that he, the driver, had smashed the plaintiff's wagon.

There was no proof, other than the alleged driver's assertion, that he was in fact a driver in the defendant's employ.

Held, that the admission, over the defendant's exception, of the declarations of the alleged driver, constituted reversible error;

That the negligence of a corporation cannot be established by the declarations of its servants made after the event.

APPEAL by the defendant, Borden's Condensed Milk Company, from a judgment of the Municipal Court of the city of New York,

borough of Queens, in favor of the plaintiff, entered on the 30th day of December, 1903.

D. Milbank, for the appellant.

B. J. Lyman, for the respondent.

WILLARD BARTLETT, J.:

The plaintiff was a physician engaged in making professional visits. Arriving at the residence of a patient he left his horse and wagon in the street and entered the house. Upon his return to the street about ten minutes later he found that his buggy had been overturned and was lying on its side with one of the hind wheels crushed. A wagon bearing the sign "Borden's Condensed Milk" was standing near by, and a person who said he was the driver told him that this vehicle was a Borden's condensed milk wagon and that he, the driver, had smashed the plaintiff's wagon — that he had waited for the plaintiff and would make a report, and that he didn't want to run away. In the present action the plaintiff has recovered damages for the injuries thus inflicted upon his buggy.

No evidence as to the occurrence of the collision was given except the testimony of the plaintiff himself. He did not see it, and all that he professed to know about it he ascertained from the declarations of a person who asserted that he was a driver in the service of the defendant corporation but who was not even proved to be such. There were objections and exceptions by counsel for the defendant upon the trial to the admission of the declarations of this alleged driver; and the admission of this evidence requires a reversal of the judgment. The negligence of a corporation cannot be established by the declaration of its servants made after the event. (*Luby v. Hudson River R. R. Co.*, 17 N. Y. 131; *Whitaker v. Eighth Avenue R. R. Co.*, 51 id. 295; *Sherman v. D., L. & W. R. R. Co.*, 106 id. 542.) The *Luby* case was an action for negligence in running down the plaintiff by a horse car. The plaintiff was permitted to prove under exception that a policeman who arrested the driver after the accident just as he was getting off the car, asked him why he did not stop, to which the driver replied that the brake was out of order. The Court of Appeals held that evidence of this declaration was improperly received. "The declaration," said *Comstock*, J., "was no part of the driver's act for

which the defendants were sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done." The same observation might just as truly be made of the evidence in the case at bar. In *Whitaker v. Eighth Avenue R. R. Co. (supra)* the plaintiff was allowed to prove that after the defendant's car had struck him and thrown him into an excavation near the track, the driver of the car said: "Damn him, let him fall in and be killed." It did not appear whether this remark was made at the moment when the car passed the plaintiff or how long subsequently. The Commission of Appeals held that the reception of the evidence of the declaration was a fatal error, and reversed the judgment in favor of the plaintiff. "While one is engaged in an act, and the intention with which he is acting is a proper subject of inquiry, his declarations, made at the time, may be given in evidence to characterize the act;" but GRAY, C., pointed out that the declarations which had been proved were not shown to have been made at the time of the alleged act of negligence. The *Sherman* case was to the same effect, holding that a narrative of the cause of a past occurrence is not admissible as part of the *res gestae*. The phrase *res gestae* in cases of this character implies substantial coincidence in time, "but if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time." (*Butler v. Manhattan Railway Company*, 143 N. Y. 417, 423.) The doctrine enunciated in the cases to which I have referred, and in scores of other decisions in this State, was plainly violated upon the trial of the present action, and we have no choice under the circumstances except to reverse the judgment.

The only case cited upon the brief for the respondent is *Brand v. Borden's Condensed Milk Co.* (89 App. Div. 188). No such question as that which is presented here arose upon that appeal, and the circumstantial evidence there was ample to warrant the inference that the accident was caused by the negligence of the defendant's servant.

All concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

TILLIE SMITH, an Infant, by ROBERT SMITH, her Guardian ad Litem, Respondent, v. EUGENE J. DONNELLY, Appellant.

Negligence — liability of a landlord for injuries resulting from defects in a window sash — duty of the landlord to advise the tenant thereof.

In an action brought against a landlord by a tenant to recover damages for personal injuries, which the tenant, while engaged in washing windows in the demised premises, sustained by falling from a window, in consequence of the absence of a stop on the upper sash thereof, it is error for the court to charge that if there was a hidden defect or danger in the premises at the time of the execution of the lease the landlord became liable, irrespective of whether he had knowledge of the defect or danger, or whether he could, in the exercise of reasonable care, have discovered the same.

If the landlord knew of the defect, and it was such as a reasonably prudent man would regard as dangerous to tenants, it was his duty to call the tenant's attention to the matter.

Where, however, it appears that the defect in question was but slight and was entirely harmless, except under special conditions not likely to occur at frequent periods, the mere failure of the landlord, who knew of the defect, to call the tenant's attention thereto, will not, in the absence of any question of fraudulent concealment, charge the landlord with liability.

HOOKER, J., dissented.

APPEAL by the defendant, Eugene J. Donnelly, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 24th day of April, 1903, upon the verdict of a jury for \$12,500, and also from an order entered in said clerk's office on the 24th day of April, 1903, denying the defendant's motion for a new trial made upon the minutes.

William J. Carr, for the appellant.

Frederick W. Sparks, for the respondent.

WOODWARD, J.:

The plaintiff, an infant, was injured by falling from a third-story window of a tenement house owned by the defendant, and brings this action to recover damages for such injuries, alleging negligence on the part of the defendant, in that there was a defect in the construction of the window frame, which permitted the window to fall out, carrying the plaintiff with it to the ground. The plaintiff's

theory of the case, accepted by the jury, was that the plaintiff was engaged in washing windows; that she approached the window where the accident occurred, put up the lower sash and reached up and pulled down the upper sash; that as this upper sash came down it flew out, because of the absence of a stile or stop, and the plaintiff, clinging to the sash, was drawn over the window sill, about two and one-half feet high, and precipitated to the ground below, to her great injury. From the judgment entered upon the verdict of the jury appeal comes to this court.

While the learned trial justice may have devoted more consideration to the plaintiff's case than was warranted, we think there was no error in granting the amendment to the complaint, without which the plaintiff would have had no standing in court. The amendment consisted of inserting "an allegation material to the case," without materially changing the cause of action alleged, and this is specially authorized by section 723 of the Code of Civil Procedure.

We are of opinion that the evidence supports the conclusion reached by the jury, and the judgment might be permitted to stand were it not for an error in the charge of the learned trial justice, to which the defendant duly excepted. The court charged that it "is the duty of the owner of property seeking to lease it to someone else, if there is any dangerous, hidden defect, a defect that is not apparent or is not discoverable or ascertainable by ordinary and reasonable observation and inspection, to apprise the tenant of the existence of that defect, or the existence of that dangerous condition, and if he fails to do so, and injury results from that defect or dangerous condition, then he is responsible. Of course, the ordinary rule of law is that a landlord renting his premises, if they are in a dangerous condition, the tenant takes the risk of that, unless there is some contract made between himself and the landlord in reference to it, or unless there is some fraud. Because a tenant going into a house, or purposing to become a tenant, it is his business to examine the premises himself and see the condition that they are in. The landlord rents them as they are, as they exist, as they are apparent to reasonable observation and investigation. But, as I say, if there is a hidden defect or danger in it that is not apparent and not observable by reasonable care and observation, such as a reasonably prudent man should make before going in, to

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occupy the house with his family, and that hidden defect, or non-apparent danger or defect, is not disclosed, then the owner of the property is responsible for any damages that ensue." The defendant duly excepted to this charge, and asked the court to charge "that the tenant of real property must run the risk of its condition, and unless he has an express agreement on the part of the landlord covering that subject, the tenant hires it at his peril, and a rule similar to that of *caveat emptor* applies, and throws upon the tenant the responsibility of examining as to the existence of defects in the premises, and of providing against their ill effects." The court responded: "I charge that, but that applies to such conditions as are apparent, to such dangers as are apparent or are discoverable or ascertainable by ordinary, reasonable observation and investigation." Defendant excepted and asked the court to charge that "unless fraud be shown, a landlord who lets a house in a dangerous state is not liable to the tenant or his family, for accidents happening during the term, that there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any." To this the court replied: "I charge that with this modification, gentlemen. That is the law except where (there) are defects or dangers that are not apparent or not discoverable or ascertainable by ordinary, reasonable observation and investigation, such as a reasonably prudent man contemplates in renting a house would make." This was excepted to by the defendant, and a further request to charge was met by a reiteration of the last-quoted modification.

It will thus be seen that this case went to the jury upon the theory that if there was a hidden defect or danger in these premises the defendant became absolutely liable, irrespective of the landlord's knowledge of this defect or danger, or whether he could, in the exercise of reasonable care, have discovered the same. We think the law does not impose such a duty upon a landlord; that he is chargeable only with the exercise of reasonable care in the discovery of defects in his premises, in the absence of knowledge. The defect in this case, the jury has found, could not have been discovered by the exercise of reasonable care in inspection on the part of the tenant, and if it had been instructed that the landlord owed only the duty of disclosing secret dangers which were known to him, or which he ought to have known in the exercise of reasonable

care, the evidence would have warranted the jury in finding that the defect complained of was not such as to have been discoverable in the exercise of that care which the landlord was bound to exercise. It appeared from the evidence that the defect was outside of the window in such a position that it was not apparent to an ordinary observer. Indeed, no one appears to have noticed it until the lowering of the upper sash of the window disclosed the fact, if it was a fact, that there was nothing to prevent it, when lowered, from swinging out into space. The evidence shows that there was a proper stop part way down, and it seems quite probable that the stop was left off on purpose to permit of taking out this upper sash for the purpose of cleaning, without the necessity of removing it, and the jury might, under proper instructions, have found that this latent defect, as shown by experience, was not one which would have attracted the attention even of an unusually careful landlord. There was no defect when the upper sash was in place; it was only apparent when the sash was lowered to the position commonly occupied by the lower sash, and the inference might properly be drawn that it was not negligent to permit this stop to remain out of place. There was a decided conflict of evidence as to whether the stop was ever out of place; whether there was, in fact, any defect, and it was of importance to the defendant, therefore, that the jury should take with them in their retirement no false impressions as to the duty of the defendant, that the evidence might be considered in its true relation to the law. This action has negligence as its basis, and there are few circumstances in which a defendant in actions of this character is called upon to exercise more than reasonable care, having regard for the dangers which are reasonably to be anticipated. It is going very close to the limit to hold that the defendant was bound to anticipate great danger from the absence of this stop, even if he knew that it was not there. There was no danger so long as the two window sashes were in their proper positions; no danger when the lower sash was not out or raised up. It became dangerous only when the lower sash was raised or taken out, and when the upper sash was lowered to the position of the lower sash. To say that the defendant was bound to anticipate that in washing these windows the plaintiff or any one else would be dragged over a window sill two and one-half feet high, is imposing a high degree of

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responsibility for not discovering this trifling defect in the window casing. But, assuming the defendant's liability to exercise reasonable care under the circumstances disclosed by the evidence, he was entitled to have the jury understand that this duty was not absolute. In *Cesar v. Karutz* (60 N. Y. 229, 231), where the action was brought for damages growing out of a failure of the landlord to notify the intended tenant that the premises were infected with smallpox germs, the learned trial justice charged the jury "that if a landlord lets premises to a tenant, and they are infected, and he knows it, it is his duty to let the tenant know it." He further charged that unless the landlord knew, or had reasonable notice that the premises were infected, the plaintiff could not recover. This charge was approved and is relied upon as an authority in *Daly v. Wise* (132 N. Y. 306, 311), for the proposition that "in case the owner of a dwelling knows that it has secret defects and conditions rendering it unfit for a residence, and fraudulently represents to one who becomes a tenant that the defects and conditions do not exist, or if he fraudulently conceals their existence from him, the lessee, if he abandons the house for such cause, will not be liable for subsequently accruing rent." If the landlord knew of this defect, and it was such as a reasonably prudent man would regard as dangerous to tenants, it was his duty, no doubt, to call attention to the matter. But this duty was not absolute, so as to charge him with responsibility for all results; he was merely bound not to fraudulently conceal the defect, and a mere failure to call attention to it, in a case where the defect only went to a slight structural imperfection, entirely harmless except under special conditions not likely to recur at frequent periods—did not impose liability upon the defendant to the extent indicated in the charge. "It is not open to discussion in this State," say the court in *Franklin v. Brown* (118 N. Y. 110, 113), "that a lease of real property only, contains no implied covenant of this character and that in the absence of an express covenant, unless there has been fraud, deceit or wrong-doing on the part of the landlord, the tenant is without remedy even if the demised premises are unfit for occupation."

In the case now before us there was no allegation of any fraud in the conduct of the landlord; there was no evidence of any fraud on

his part, and the charge of the learned trial court that the defendant was liable if the defect existed and he failed to call the attention of the tenant to the defect, presents reversible error. It is true that in this case there was some evidence from which the jury might have found that the defendant's agent, a lady about ninety-five years of age, had had her attention called to a somewhat similar accident which occurred to a former tenant some four or five years before, and it may be that this knowledge on the part of the defendant's agent was notice to him of this defect, if the accident was really due to the same cause, which is by no means clear from the evidence. But in the absence of some evidence that this fact was fraudulently concealed from the tenant—and a motive for such concealment would be difficult to imagine where the defect could have been repaired for a few shillings—the plaintiff has failed to establish a cause of action, and the charge of the court permitted the jury to impose a burden which the law does not sanction. (*Daly v. Wise, supra.*) This accident occurred, if at all, in 1898. It does not appear from the evidence that the accident was due to the same defect which is now urged as a basis for recovery in this action, although it is brought down to the same window, and if this old lady, acting as the agent of the defendant, having notice of this accident, and perhaps of this same defect in 1898, failed to call attention to it in April or May, 1901, it hardly seems consistent with justice that the defendant should be charged with liability for this accident, particularly under a charge which makes the duty of giving notice of the defect absolute.

The judgment and order appealed from should be reversed, with costs.

All concurred (JENKS, J., in result), except HOOKER, J., dissenting.

Judgment and order reversed and new trial granted, costs to abide the event.

MARIA E. DUCKER, Appellant, v. ALFREDO DEL GENOVESE,
Respondent.

Covenant by a lessee to make all repairs to and in every respect to maintain said property—it does not require him to rebuild where without his fault a factory building collapses—construction of words ejusdem generis—construction of the language of a promise.

A lease of two factory buildings for a period of ten years, by which the lessee covenants to "make all repairs of whatever kind or description to said property, keep roof and all outside in order, and in every respect maintain said property so that there will be no expense whatsoever to party of the first part other than the regular City tax (except water tax) and the insurance. * * * And that at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted," does not, in the event of the collapse of the buildings, not due to any negligence on the part of the lessee, or to his failure to repair any defects discoverable upon a reasonable inspection of the premises, impose upon the lessee the duty of rebuilding the premises.

The covenant must, in respect to the lessee's duty to make repairs, be construed upon the principle that where words of general description are associated with words of particular description the general words, in the absence of anything clearly manifesting a contrary intent, shall be limited so as to be *ejusdem generis* with the particular words.

If the language of a promise may be understood in more senses than one, it is to be interpreted in the sense in which the promisor had reason to believe that it was understood.

APPEAL by the plaintiff, Maria E. Ducker, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 2d day of July, 1903, upon the decision of the court, rendered after a trial at the Kings County Special Term, sustaining the defendant's demurrer to the second cause of action set forth in the plaintiff's complaint.

Nathan Ottinger [John Frankenheimer with him on the brief], for the appellant.

William H. Cochran, for the respondent.

WOODWARD, J.:

The complaint attempts to set forth two causes of action, one for rent and the other for damages alleged to have been sustained by

reason of the collapse and total destruction of the building upon the premises, which the plaintiff had leased to the defendant. The defendant demurs to the second cause of action on the ground that it does not state facts sufficient to constitute a cause of action, in that it fails to allege that the building collapsed through any fault of the defendant. The demurrer was sustained at Special Term, and appeal comes to this court, the question of law being the proper construction of the lease under which the defendant occupied the premises.

The lease is for a period of ten years and covers the factory property known as Nos. 42 and 44 Fulton street and No. 37 Doughty street, borough of Brooklyn, and the plaintiff contends that the defendant undertook absolutely to redeliver the premises in their original condition at the end of the term, under clauses of the lease reading as follows :

“ And the said party of the second part doth covenant to pay unto the said party of the first part the said yearly rent as herein specified. And make all repairs of whatever kind or description to said property, keep roof and all outside in order and in every respect maintain said property so that there will be no expense whatsoever to party of the first part other than the regular City tax (except water tax) and the insurance. * * * And that at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.”

It is conceded that some time after the defendant entered into possession of these premises the buildings collapsed and fell in, so that under the orders of the local authorities the same were completely demolished, and the theory of the plaintiff is that she is entitled to recover the value of these buildings, because the defendant, under his covenant to repair and maintain said property, has failed to restore them. There is no allegation in the complaint of any negligence on the part of the defendant producing the collapse ; there is nothing to suggest that the collapse was due to any failure on the part of the defendant to repair any defects which were discoverable upon a reasonable inspection of the premises, and the action rests wholly upon the proposition that the defendant in covenanting to make repairs and

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to maintain the premises took upon himself the duty of restoring the buildings which collapsed through no fault of his own, but, as we may assume, through structural defects which were unknown to the parties either at the time of entering into the contract or prior to the falling of the buildings. We are clearly of opinion that the covenants of the lease do not impose the burden which the plaintiff undertakes to assert; that a covenant to repair and maintain buildings is not a covenant to reconstruct buildings destroyed through no fault of the tenant, unless the language is such as to absolutely compel this conclusion. Where a doubt exists as to the meaning of words, resort may be had to the surrounding facts and circumstances to determine the meaning intended. If the language of a promise may be understood in more senses than one, it is to be interpreted in the sense in which the promisor had reason to believe it was understood. (*Gillet v. Bank of America*, 160 N. Y. 549, 555, and authorities there cited.) If we place ourselves in the position of this defendant, about to rent these two factory buildings, we may assume safely that he contemplated that he was securing buildings which were reasonably adapted to the uses for which he was hiring them, and while it is true that, in the absence of some provision in the contract, there is no implied warranty that the premises are fit for such purposes, the language of the contract is to be construed as contemplating buildings which, under ordinary circumstances, would continue in existence during the demised term. The plaintiff proposed to him, by the language of the contract, not that he should insure the continued existence of such buildings, but that he should "make all repairs of whatever kind or description to said property, keep roof and all outside in order and in every respect maintain said property," not in the sense of insuring its continued existence, but "so that there will be no expense whatsoever to party of the first part other than the regular City tax," etc. That is, assuming that the buildings would remain, the defendant covenanted to make all repairs, both inside and outside, including the roof, and to "maintain said property so that there will be no expense whatsoever to party of the first part," which involve painting and whatever was necessary to keep the buildings in a state of preservation. This is what the language fairly imports; it is what the defendant, reading

over the language of the covenant, had a right to understand what was intended by the plaintiff. The effort to place upon this covenant a construction which made the defendant an absolute insurer of the buildings is without warrant under any rule of construction which has been called to our attention, or with which we have any acquaintance. The covenant relates to repairs and maintenance of the buildings in existence, not to the reconstruction of the buildings which might be destroyed by the elements, and the covenant specifying the nature of the repairs which were contemplated, we are of opinion that it comes within the well-settled principle of construction, that where words of general description are associated with words of particular description the general words, in the absence of anything clearly manifesting a contrary intent, shall be limited so as to be *eiusdem generis* with the particular words. (*Belden v. Burke*, 72 Hun, 51, 83; *Given v. Hilton*, 95 U. S. 591, 598; *Matter of Reynolds*, 124 N. Y. 388, 397; *Morton v. Woodbury*, 153 id. 243, 253; *Johnson v. Goss*, 128 Mass. 433, 434.) The language of this covenant dealt with details; it specified particular repairs which were to be made, and thus limited the construction to be put upon the broad language used in that connection. This is the fair and reasonable view of the contract between the parties, and the courts will not attempt to enlarge the scope of the agreement where the obvious result must be an injustice. If the buildings fell without fault on the part of the defendant, it could not be the duty of the latter to rebuild them under the language which the plaintiff has used in her contract with him, and the interlocutory judgment sustaining the demurrer is supported by reason and authority.

The interlocutory judgment appealed from should be affirmed, with costs.

All concurred.

Interlocutory judgment affirmed, with costs.

JOHN H. CUSACK, Appellant, v. WALTER M. AIKMAN, Respondent.

Real estate broker — when his commissions are earned.

A broker employed to secure a purchaser of real estate, who procures a customer to whom his employer agrees to sell such real estate, is entitled to recover commissions, notwithstanding the fact that thereafter the employer refuses to enter into a formal contract of sale because a building upon the land intended to be conveyed encroaches upon adjoining land.

APPEAL by the plaintiff, John H. Cusack, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendant, entered on the 17th day of December, 1903.

Clarence B. Campbell, for the appellant.

Edo E. Mercelis, for the respondent.

JENKS, J.:

The action is for brokerage in procuring a purchaser for the defendant's real estate. The evidence establishes the employment of the plaintiff by the defendant. The plaintiff procured a proposed purchaser who examined the premises under the guidance of the defendant, and thereafter the purchaser and the defendant agreed upon a sale. The purchaser attended at the time and place named to execute the contract, but the defendant defaulted. His explanation is that he ascertained that his stable encroached four inches upon adjacent vacant land, and that, therefore, he could not sign the proposed contract. He testifies that he informed the broker of the defect before the day appointed for the execution of the contract, but after he had agreed upon the sale. The broker testifies that he first learned of the defect on the day set for the closing of the contract. The purchaser testifies that she was first informed of the defect after she had attended to execute the contract, that she then for the first time so refused for the reason that the defendant could not give a clear title, but that she at the time of such refusal offered to execute the contract if the defect was cured. If the sale fell through from a defect in the title of the vendor, nevertheless, the broker, under the circumstances, may

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recover because he has performed his contract with his principal. (*Gilder v. Davis*, 137 N. Y. 506.)

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concurred.

Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.

* BRIDGET WALSH, as Administratrix de bonis non, etc., of MICHAEL WALSH, Deceased, Appellant, v. JOHN H. HANAN and Others, Respondents.

Release of one tort feasor, excepting the liability of others — it is in effect a covenant not to sue.

An instrument under seal, executed by a party injured by a tort, in which he releases one of the joint tort feasors from all liability, but reserves therein his right of action against the other joint tort feasors, is not technically a release, but a covenant not to sue, and it does not operate to discharge the joint tort feasors as against whom the right of action is reserved.

REARGUMENT of an appeal by the plaintiff, Bridget Walsh, as administratrix *de bonis non*, etc., of Michael Walsh, deceased, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 4th day of January, 1900, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term.

Willis B. Dowd, for the appellant.

Jesse W. Johnson, for the respondents.

JENKS, J.:

The judgment must be reversed and a new trial must be granted. Mr. Duncan, the owner of a building, leased the shop and the basement thereof to Messrs. Hanan, who sublet the basement to Mr.

* Substituted for Johanna Brogan, as administratrix, etc., of Michael Walsh, deceased, by an order of the Supreme Court, made at the Kings County Special Term, dated September 9, 1908.—[REP.]

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Abramson. The plaintiff complained against the Messrs. Hanan in that they negligently and unlawfully failed to protect steps which afforded access to the basement, so that the intestate fell down the steps to his death. At the close of the whole case the learned trial court dismissed the complaint, but not alone upon the plea of release hereinafter referred to, and the plaintiff appealed to this court. We affirmed the judgment, and I wrote for the court. (*Brogan v. Hanan*, 55 App. Div. 92.)

The defendants pleaded, *inter alia*, that the plaintiff had released under seal Mr. Duncan, the owner of the premises, from all liability, and read the release in evidence. The plaintiff had reserved therein all rights of action for negligently causing the death of her intestate against the Messrs. Hanan as lessees, and against all other person or persons in possession and control of the premises at the time of the casualty and prior thereto. We held that the defendants Hanan well pleaded the release in bar, because they were joint tort feasors with the owner of the premises. The many authorities for that proposition are cited in the opinion reported in the 55th Appellate Division Reports. But since our judgment, the Court of Appeals has decided *Gilbert v. Finch* (173 N. Y. 455). In the opinion the court, commenting upon a release with a reservation, say: "Reservations of this character in releases are not uncommon, and their effect has been the subject of frequent adjudication by the courts. It is quite true that the courts of our sister States have reached different conclusions upon the question, and that a sharp conflict exists in the courts of our own State, as, for instance, *Matthews v. Chicopee Mfg. Co.* (3 Robt. 712); *Commercial Nat. Bank v. Taylor* (64 Hun, 499), on one side, and *Mitchell v. Allen* (25 Hun, 543); *Delong v. Curtis* (35 Hun, 94), and *Brogan v. Hanan* (55 App. Div. 92), upon the other side." After a long discussion the opinion concludes: "Where the release contains no reservation it operates to discharge all the joint tort feasors; but where the instrument expressly reserves the right to pursue the others it is not technically a release, but a covenant not to sue, and they are not discharged. It follows that the release, so-called, did not operate to discharge the defendants."

Inasmuch as the clash of authorities seems to have been stilled by this decision of our highest court, our former judgment, which

was based solely upon the release, must be overruled, and, under the circumstances, we think that a new trial of the issue is required. We do not intend to express any opinion upon the merits of the case aside from the feature of the general release, or in any other way to trammel the action of the court upon the new trial granted.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

OLIVER WILLIAMS, Respondent, v. CENTRAL RAILROAD COMPANY OF NEW JERSEY, Appellant.

Railroad company — liability for a passenger's trunk stolen while in its possession — it is an insurer — burden of proof — the law of the place of delivery governs — statute of New Jersey limiting the liability when notice is posted.

In an action brought against a railroad corporation to recover damages for the negligent loss of a trunk owned by the plaintiff's assignor, it appeared that the railroad company received the trunk at its station in New York city from an expressman; that the plaintiff's assignor bought a ticket on the defendant's railroad to Roselle, N. J., and that she then went to the baggage room and asked that her trunk be checked to her journey's end. The trunk could not be found, and the plaintiff's assignor, desiring to take a certain train, accepted a check for her trunk on the promise of the bagagemaster to send it on to Roselle. She presented the check at Roselle, but the trunk was not delivered to her, and it subsequently appeared that it had been stolen from the defendant's possession.

Held, that the defendant's obligation with respect to the trunk was that of a common carrier and not of a warehouseman;

That, as a common carrier, it was an insurer of the trunk except against an act of God or of the public enemy;

That the plaintiff made out a *prima facie* case when he showed a demand for the trunk accompanied by a presentation of the check at the place where the defendant undertook to deliver the trunk and the failure of such defendant to comply with such demand;

That the mere proof that the trunk was stolen while in the possession of the defendant did not acquit the latter of negligence;

That the rights of the parties were governed by the law of New Jersey;

That a statute of the State of New Jersey that any railroad company of that State might, by giving notice to persons tendering baggage to it, limit its liability as a carrier of such baggage to \$100 for each hundred weight of such baggage, unless such person should pay an additional charge, and that "a general notice of the limitation of such company's responsibility, placed in a

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conspicuous place, at or in the receiving office of such company, where goods, merchandise or baggage are usually received by them for transportation, and inserted in the bills of lading or receipts given for such goods or merchandise, and in the tickets delivered to passengers, shall be deemed sufficient notice under this section," did not apply;

That, assuming that the statute did apply, the provision therein for a general notice to persons tendering baggage was insufficient;

That, as the evidence showing compliance with the provision of the statute requiring the posting of the notice prescribed therein was given by employees of the defendant, who were chargeable with the performance of that duty, it was proper for the court, although the evidence given by those witnesses was not contradicted, to submit the question of compliance with the statute to the jury, as the interest of the witnesses in establishing that they had performed the duty incumbent upon them, was sufficient to make their credibility a question for the jury.

What notice, assuming that it might be given in the manner specified in the statute, was sufficient, considered.

APPEAL by the defendant, the Central Railroad Company of New Jersey, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 28th day of May, 1903, upon the verdict of a jury for \$849.35, and also from an order entered in said clerk's office on the 22d day of May, 1903, denying the defendant's motion for a new trial made upon the minutes.

The statute of the State of New Jersey referred to in the opinion reads as follows :

" Any railroad company of this State may, by giving notice to any person or persons offering goods, merchandise or baggage for transportation on the railroad, or in the boats or vessels of such company, limit their responsibility as carriers thereof to one hundred dollars for every one hundred pounds weight of such goods, merchandise or baggage, and at that rate for a greater or less quantity, unless such person or persons so offering such goods, merchandise or baggage for transportation, shall pay to said company, by way of insurance, for any additional amount of responsibility to be assumed, such rate or rates as may be charged by said company therefor, not to exceed the legal rates for transporting one hundred pounds of goods or merchandise on such railroad, or in such boats or vessels, for every two hundred dollars of additional responsibility assumed on each one hundred pounds of such goods, merchandise or baggage, and at that rate for

a greater or less quantity; and a general notice of the limitation of such company's responsibility, placed in a conspicuous place, at or in the receiving office of such company, where goods, merchandise or baggage are usually received by them for transportation, and inserted in the bills of lading or receipts given for such goods or merchandise, and in the tickets delivered to passengers, shall be deemed sufficient notice under this section." (See Gen. Stat. of N. J. 2672, § 138.)

Robert Thorne, for the appellant.

Robert L. Luce, for the respondent.

JENKS, J.:

The action is by the assignee of a passenger against a railroad company for the negligent loss of a trunk. The defendant conceded that it received the trunk at its station in New York city from an expressman. The assignor of the plaintiff subsequently went to the station, bought a ticket on the defendant's railway for her carriage to Roselle, N. J., then went to the baggage room, showed her ticket with the express check to the baggage master and asked that her trunk be checked to her journey's end. Neither the baggage master nor the passenger could find the trunk. The passenger, desiring to take a certain train, accepted a check for her trunk on the promise of the baggage master that he would send the trunk on to Roselle. She presented the check at Roselle, but the trunk was not delivered to her. It subsequently appeared that it was taken from the possession of the defendant by theft. Despite the plaintiff's contention that the defendant under the circumstances was a warehouseman, the case was tried on the theory that its relation to the passenger was that of a common carrier. I think that the court did not err. The passenger did not intrust the trunk to the defendant to keep on storage, nor did the defendant receive it for that purpose. She contemplated a carriage of the trunk in the train whereon she proposed to travel, but, with the alternative of her detention, she consented that the trunk, which presumably at that moment could not be found, although the supposed explanation for its absence was then made to her, should be forwarded by a later train. This is entirely opposed to the idea of keep or storage. I think, therefore, that the defend-

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ant must be regarded as a common carrier. (*Shaw v. Northern Pacific Railroad Company*, 40 Minn. 144.)

The law of New Jersey is applicable. (*Curtis v. Del., Lack. & Western R. R. Co.*, 74 N. Y. 116; *Brown v. Camden & Atlantic Railroad Co.*, 83 Penn. St. 316.) But I think that the statute raised by the defendant does not apply. The defendant was a common carrier, and as such was an insurer save against an act of God or of the public enemy. (*Pennsylvania R. R. Co. v. Knight*, 58 N. J. L. 287.) The action is for negligence, and the plaintiff's assignor made out a *prima facie* case when he showed a demand for the trunk accompanied by a presentation of the check at the place where the defendant undertook to deliver the trunk, and the failure of the defendant to deliver it. (*Burnell v. New York Central R. R. Co.*, 45 N. Y. 184.) The bare proof that the trunk was stolen while in the possession of the defendant did not acquit the defendant of negligence. In *Burnell v. New York Central R. R. Co.* (*supra*) it is said: "If it (the trunk) had been burned or stolen *without fault on their part*, the defendants would not have been liable." I think that the statute must be construed as a limitation upon the defendant's liability as an insurer. This view is strengthened by the provision thereof which reads "unless such person or persons so offering such goods, merchandise, or baggage for transportation, shall pay to said company, *by way of insurance*, for any additional amount of responsibility to be assumed," etc. (See General Statutes of N. J., 2672, § 138.) The Supreme Court of New Jersey has held that while a carrier may contract not contrary to public policy, so that his liability may be regulated, lessened or limited, yet he cannot contract against "his own clear positive wrong, default or misconduct, whether it arise from his own wilfulness, recklessness, incapacity, want of skill, or the failure to exact it." (*Ashmore v. Pennsylvania Steam Towing Transportation Co.*, 28 N. J. L. 180, 193.)

But assuming that the statute did apply, I think that the judgment may be sustained. It is settled in this State that the provision for general notice is insufficient. (*Thomp. Carr.* 526, 528; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, Id. 251; *Rawson v. Pennsylvania Railroad Co.*, 48 N. Y. 212.) And the latter case also applies to such notice as was printed on the railroad tickets. The rule seems to be contrary in Pennsylvania. (Thomp.

Carr. 526; *Whitesell v. Crane*, 8 Watts & S. 369; *Bingham v. Rogers*, 6 id. 495; *Laing v. Colder*, 8 Penn. St. 479.) We are not cited to any decision in New Jersey, and I have not been able to find any authority in that State. *Kinney v. Central Railroad Company* (32 N. J. L. 407) is not wholly satisfactory for the reason that the attention of the acceptor of the pass was specifically called to the contract, in addition to the printing on the pass. There is no proof in this case that the plaintiff's assignor ever saw the notice in the room or on the ticket, or that she had her attention called to either of them. But assuming that the statute is valid as to its provision for notice, the question still remained whether the defendant had complied with it.

As the notice to be posted is general, it is but just to regard the requirement that the place of posting shall be "conspicuous" as an essential part thereof. Conspicuous means "open to the view; catching the eye; easy to be seen; manifest." (Cent. Dict.) "Obvious to the sight; seen at a distance." (Wor. Dict.) "Exposed to the view; clearly visible; prominent and distinct." (Standard Dict.) For example, a post box is held to be a conspicuous place for the deposit of a notice (*January v. Superior Court*, 73 Cal. 537), and the door of a residence for the affixing of a notice. (*Rameey v. Barbaro*, 20 Miss. 293.)

The question was whether there was a notice at this time in the baggage room and, if so, whether it was posted in a conspicuous place. The word "conspicuous" required the defendant to post the notice in the baggage room so that naturally, under the general surrounding circumstances, it would be open to the view, obvious to the sight, and catch the eye of the passenger of ordinary care and observation, and be seen by him in the course of checking his luggage. Greenawalt, the baggage master, and Hay, the foreman of the baggage checkers, testified that at the time in question notices were posted in the baggage room. They described with particularity the dimensions of the room, the construction and arrangement thereof, and the relative situation of the notice to the checking counter and the entrances to the room. Hay further testifies: "Different persons attend to posting up these notices—the baggage master in charge of the room. Mr. Greenawalt is the general baggage agent. He is above that. The baggage agent in charge of the

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room does that. His name is Mr. Purick." Greenawalt also testified that in October, 1900, there was a notice to the left of the counter. "We put up a new one whenever it would become defaced or anything of that sort. We would keep one up all the time. * * * If they get dirty, we take them down and put a new one up." In any event, Greenawalt, the general baggage agent, is testifying to the posting of the notice in October, 1900, and what "we," *i. e.*, he and others, even if subordinates, did in the posting thereof. There was no other testimony on this subject.

It is contended that the learned court erred in submitting the question of compliance with the statute to the jury. This depends upon whether these witnesses must be regarded as interested in the sense of bias so as to make such submission proper in order that, mangre non-contradiction, the jury might pass upon their credibility. The jury were certainly free to infer from the testimony that Greenawalt, the general baggage agent, and those under him—"different persons"—attended to the duty of posting the notices, and hence if this had not been done, it was the fault or dereliction of Greenawalt and his subordinates. Both Greenawalt and his subordinate Hay "had, or might have, a motive for shielding" Greenawalt and those under him "from blame," and consequently their credibility was for the jury. (*O'Flaherty v. Nassau Electric R. R. Co.*, 34 App. Div. 74; *affd.*, 165 N. Y. 624; *Volkmar v. M. R. Co.*, 134 id. 418; *Elwood v. Western Union Telegraph Co.*, 45 id. 549.) *BARKER*, J., in *Michigan Carbon Works v. Schad* (38 Hun, 71), after a learned discussion, says: "It is also competent to prove the social and business relations existing between the witness and the party calling him to the stand, and if it is established that they are such as usually and ordinarily produce an interest in the mind of the witness in favor of the party calling him on the question in dispute, then it is for the jury to say to what extent, if any, the relationship impairs or destroys the credibility of the witness." In *Pratt v. Ano* (7 App. Div. 494) the court, per *WARD*, J., say: "This evidence was given by the plaintiff's foreman, whose business it was to look after this timber and protect it from injury, and who, having failed to do so, was, in a sense, interested in giving a good reason why he had not done so." I think that even if the court erred in its charge, which I am not entirely prepared to say, the

errors were sufficiently corrected by the subsequent qualifications and charges delivered at the request of the defendant.

The judgment and order should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

ALBERT R. GENET, Respondent, *v.* VIRGINIA WILLOCK, as Administratrix, etc., of WILLIAM WILLOCK, Deceased, Appellant.

Proof required of a claim for rent against a decedent's estate where no demand therefor was made against him — a claim for funeral expenses is not the subject of a reference under section 2718 of the Code of Civil Procedure.

A claim presented against a decedent's estate, for rent of premises occupied by the decedent and his maiden sister for a period of five years, should, where the claimant does not contend that he made any claim for such rent during the decedent's lifetime, be carefully scrutinized and admitted only upon very satisfactory proof.

Evidence which is insufficient to warrant the allowance of such claim, considered.

A claim for funeral expenses is not regarded as a debt due from the decedent, but rather as a charge against his estate.

Such a claim cannot, therefore, be made the subject of a reference, pursuant to section 2718 of the Code of Civil Procedure, notwithstanding the consent of the decedent's administratrix to the reference and her omission to raise the objection upon the reference.

HIRSCHBERG, P. J., dissented.

APPEAL by the defendant, Virginia Willock, as administratrix, etc., of William Willock, deceased, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Westchester on the 10th day of June, 1903, upon the report of a referee.

Nathan P. Bushnell, for the appellant.

Cornelius B. Palmer, for the respondent.

JENKS, J.:

An administratrix appeals from a judgment resulting from a reference of a disputed claim under section 2718 of the Code of Civil Procedure. The plaintiff has recovered for the use and occupancy of a house, for funeral expenses and for money advanced to the intestate.

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I think that the evidence does not warrant a recovery for the use and occupation. As the plaintiff does not contend that, during the lifetime of the intestate he ever made claim for rent, his claim must be "carefully scrutinized and admitted only upon very satisfactory proof." (*Kearney v. McKeon*, 85 N. Y. 136; *Matter of Van Slooten v. Wheeler*, 140 id. 624; *Porter v. Rhoades*, 48 App. Div. 635.)

The plaintiff must show either that the conventional relation of landlord and tenant existed, or must prove other circumstances sufficient for the law to imply a contract. (*Lamb v. Lamb*, 146 N. Y. 317; *Collyer v. Collyer*, 113 id. 442.) The plaintiff was the nephew of the intestate. The intestate had leased from Mr. Ripley a house of nine rooms with a barn and outhouses, situated upon four and a half acres of land in a rural community, for sixty dollars a year, and it appears that the plaintiff had made some payments to Ripley on that rent. Thereafter the plaintiff purchased the house, and owned it for a time, and also for a subsequent time controlled it as lessee. After the house passed from the ownership of Ripley, the intestate and his maiden sister occupied it for five years and upwards. The claim is for the rental value of those five years. It appears from the evidence that the intestate was in very moderate circumstances. The plaintiff has not only presented a claim for the rent against the estate, but has also sued his aunt (the administratrix), contending that she, too, is separately liable therefor. As I have said, the plaintiff does not pretend that he ever made any claim upon either his uncle or his aunt for any rent until after the death of the intestate, or that the matter was ever discussed between them. Although he states that he kept books of account wherein he charged every large indebtedness to him, save in the instance of his own brother's debt, he admits that he never made any charge therein for this rent, although he kept a memorandum of what it cost him "to carry that place." The plaintiff's aunt, the joint occupant of this house, against whom the plaintiff now makes a separate demand for this rent, testifies without contradiction that the plaintiff never at any time said anything to her about a rent charge, never asserted any claim therefor, and never demanded any rent from the intestate or from her. The relationship and the relative situation of the nephew, his uncle and his aunt at least afford a

reason why the nephew might have permitted such occupancy without charge of rent, while there is evidence of a dispute and disagreement between nephew and aunt subsequent to the death of the testator, which might be the explanation of the nephew's change of heart and for the present presentation of this claim. The fact that the intestate leased from Mr. Ripley the premises which the nephew subsequently acquired is not sufficient under the circumstances to establish that there was a continuance of that relation between nephew and uncle and aunt, especially in view of the fact that the nephew had on occasions paid the rent to Mr. Ripley, apparently on account of his relationship. What proof, beyond the bare fact of this occupancy, is there that establishes that the plaintiff even expected any rent? On the other hand, the proof justifies the conclusion that both the intestate and his sister had no reason to suppose that they were other than tenants by the bounty of their nephew. In *Collyer v. Collyer (supra)* EARL, J., says: "But the law will not imply a contract contrary to the intention of the parties."

I think that the judgment for the funeral expenses cannot be upheld. The reference is expressly made pursuant to section 2718 of the Code of Civil Procedure. This statute is limited to claims which existed against the intestate. A claim for funeral expenses is not of this character, inasmuch as it is not strictly regarded as a debt due from the intestate, but rather a charge against his estate. (*Patterson v. Patterson*, 59 N. Y. 574.) This charge, then, could not be made the subject of a reference, notwithstanding the consent of the administratrix and her omission to object upon the reference. (*Shorter v. Mackey*, 13 App. Div. 20; *Matter of Van Slooten v. Dodge*, 145 N. Y. 327; *Hovey v. Hovey*, 46 Hun, 71.)

The checks of the plaintiff and the indorsements thereon, coupled with the writings of the intestate, are, I think, sufficient to sustain the findings of the indebtedness of twenty-seven dollars. But in all other respects the testimony is not sufficient to uphold the judgment.

The judgment should be reversed.

All concurred, except HIRSHBERG, P. J., dissenting.

Judgment reversed, with costs, and proceedings remitted to the Surrogate's Court for further action.

IDA NEUFELD and Others, Appellants, v. THE CITY OF NEW YORK,
Respondent.

Voluntary payment — financial distress and inability otherwise to procure a loan does not make a payment involuntary.

While the owners of land located in the city of New York were engaged in erecting a building thereon, the city authorities, deeming the building unsafe, stopped work thereon and altered the foundations thereof. The city filed a *lis pendens* against the premises for the cost of the alterations. At the time of the filing of the *lis pendens* the owners were in financial distress and had arranged for a loan, the making of which was prevented by the filing of the lien. In order to secure the loan they paid the amount of the lien.

Held, that the payment was voluntary and that the owners were not entitled to recover the amount thereof from the city.

APPEAL by the plaintiffs, Ida Neufeld and others, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 23d day of May, 1902, upon the decision of the court, rendered after a trial at the Kings County Special Term, dismissing the complaint upon the merits.

It appears that while the plaintiffs were engaged in erecting a building upon land owned by them in the city of New York, the city authorities, deeming the building unsafe, stopped work thereon and thereafter altered the foundation and did certain other work thereon at a cost of \$3,181.40, for which amount it filed a *lis pendens*. The plaintiffs subsequently paid the amount of the lien and this action is brought to recover the amount of such payment on the ground that it was involuntary.

Eugene V. Brewster, for the appellants.

John J. Delany [James D. Bell and P. E. Callahan with him on the brief], for the respondent.

JENKS, J.:

I agree with the learned Special Term that the payment was voluntary. The learned counsel for the appellant concedes that this payment if but made under protest, or with objection, or coupled with the threat to sue, is not sufficient to permit a recovery. But

he relies upon the proof that the plaintiffs at the time were in financial distress, that they had arranged for a loan from a leading corporation upon which they depended, and that the filing of the lien by the defendant prevented the loan, and, therefore, threatened disaster. In *Redmond v. Mayor* (125 N. Y. 632) it is held that the payment of an invalid tax which was a lien, in order to obtain a loan, was voluntary. In *Vaughn v. Village of Port Chester* (135 N. Y. 460), although the payment was pronounced involuntary, the court, per GRAY, J., say: "The defendant insists, and that presents the only ground upon which we need consider its appeal, that the payment was voluntary on the plaintiff's part. If that were true, and it was made simply to enable her to close with the vendee for the sale of the property, then the appellant should prevail. If a payment of an illegal assessment is made to successfully close a business transaction, it is a payment for convenience, and, therefore, voluntary. To make it involuntary, it must be made because of coercion in fact or coercion by law."

In *Swift Co. v. U. S.* (111 U. S. 22), cited by the learned counsel for the appellants, the court say that the exaction of the United States was in effect saying to the appellant that unless it complied with such exaction it could not continue its business at all. "The only alternative was to submit to an illegal exaction or discontinue its business." In *Peyser v. Mayor* (70 N. Y. 497), also cited, the proceedings were said to have the force of a judgment under which the collector had the right to take and sell the goods. In *Poth v. Mayor* (151 N. Y. 16), also cited, the assessment was paid after legal steps had been taken for its collection. In *Buckley v. Mayor* (30 App. Div. 463; affd., 159 N. Y. 558) the owner was compelled to pay for a permit under threat of arrest, whereupon the foreman stopped the work, and the coercion was said to be a threat of brute force. I think that the case at bar is within the principle of *Redmond v. Mayor*, and the exception noted in *Vaughn v. Village of Port Chester* (*supra*), and is not governed by the other authorities I have noticed for the reason that there was no coercion in this case. The lien filed was but notice of a claim. The facts that the plaintiffs could not proceed with the work unless they obtained a loan from a certain proposed lender, and that the lender refused to make the loan unless the lien was lifted, were but accidental. The filing

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of the lien did not, *ipso facto*, stop the work. Not only is the case within the authorities cited, but the further circumstances that the plaintiffs made arrangements as to the materialmen to throw off \$1,900 of their bills, and also accepted a rebate of \$1,000, tend to establish the fact that their payment was voluntary.

The judgment should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

JUAN M. CEBALLOS and Others, as Copartners Trading under the Firm Name and Style of J. M. CEBALLOS & Co., Appellants, v. MUNSON STEAMSHIP LINE, Respondent.

Contract — when not so absurd as to be unenforceable — question of novation, when one for the jury — violation of the United States statutes against monopolies.

What contract between shippers of cattle, by which they agreed to pay commissions one to the other on cattle carried by them, is not so absurd or unreasonable as to be unenforceable, considered.

What evidence justifies the submission to the jury of the question whether there was a novation, considered.

When such a contract, which contains no provision as to maintaining rates or preventing competition, and does not fix prices nor confine dealings to a combination of persons, does not violate the United States statutes relating to monopolies, considered.

APPEAL by the plaintiffs, Juan M. Ceballos and others, as copartners trading under the firm name and style of J. M. Ceballos & Co., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 8th day of August, 1903, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term at which the jury had passed upon certain questions submitted to them.

The action was brought to recover commissions on freights under an alleged contract between the plaintiffs' predecessor, Juan M. Ceballos, with the defendant's predecessor, W. D. Munson.

John Howard Corwin, for the appellants.

Everett P. Wheeler, for the respondent.

JENKS, J.:

I think that the nonsuit cannot be sustained. The learned court, by consent of counsel, submitted to the jury as the second question: "Was the agreement made between the plaintiffs' predecessor and the defendant's predecessor in October, 1897, to continue so long as Walter D. Munson should carry cattle to Cuba?" The learned court, without objection, charged the jury that if they answered this question in the affirmative, they should pass to the further question whether the defendant took over the contract. The testimony of Mr. Rohl, admitted without objection as to variance, justified the submission of this question to the jury. It is, therefore, not essential that we should discuss the terms of the contract as pleaded in the light of its alleged uncertainty, for its termination was fixed by the cessation of Mr. Munson to carry cattle to Cuba. It cannot be urged that such a contract was so absurd or so unreasonable as to be non-enforceable. The consideration thereof was the mutual agreement to pay commissions, based on percentages, one to the other, as one or the other carried cattle. The contemplated and natural effect of the difference in the percentages was to throw the carriage to Mr. Munson's steamship line, and, as a corollary, Mr. Ceballos ceased from such carriage. The question as to whether the defendant took over the contract, whether there was a novation, as the parties termed it, was for the jury. Professor Ames (6 Harv. L. Rev. 184, 186) says: "The difficulty in novation cases is, therefore, no longer one of law, but of fact." The bill of sale by Mr. Munson to the defendant corporation, the retention of the chief ownership of that business by Mr. Munson, the accountings rendered thereafter to the plaintiffs upon the basis of the agreement, the payments thereon, the acceptance of the same by the plaintiffs and the bringing of this suit (*Osborn v. Osborn*, 36 Mich. 48) justified the submission. (*De Witt v. Monjo*, 46 App. Div. 533; *Osborn v. Osborn*, *supra*; *Robbins v. Robinson*, 176 Penn. St. 341; *Mitrovich v. Fresno Fruit, etc., Co.*, 123 Cal. 379; *Regester v. Dodge*, 61 How. Pr. 107, citing many authorities;

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Thompson v. Percival, 3 Nev. & Man. 167; *Mulgrew v. Cochran*, 96 Mich. 422; *Walker v. Wood*, 170 Ill. 463; *Lynch v. Austin*, 51 Wis. 287; *Shaw v. McGregor*, 105 Mass. 96.) If the contract of substitution of the defendant be established, then there is consideration. LONGWORTH, J., in *Bacon v. Daniels* (37 Ohio St. 279) says: "The existence of the contract being established, the consideration is self evident." (See, too, *Ryan v. Pistone*, 89 Hun, 78; *Kromer v. Heim*, 75 N. Y. 574.)

I think that the contract was not necessarily in violation of the Federal Anti-Trust Law (26 U. S. Stat. at Large, 209, chap. 647). As testified to by Mr. Rohl, Mr. Munson agreed to pay percentages on freights earned by Mr. Munson, and Mr. Ceballos agreed to pay Munson one-half of such percentages on all freights earned by Ceballos as long as either should carry any cattle to Cuba. There was no provision as to maintaining rates or as to preventing competition. Prices were not fixed, dealings were not confined to a combination of persons, nothing tended towards a monopoly, and, therefore, I think the parties are without the ban of the law. (*Leslie v. Lorillard*, 110 N. Y. 519, 534; *Brooklyn Elevated R. R. Co. v. B., B. & W. E. R. R. Co.*, 23 App. Div. 29.)

But I think that the verdict is against the weight of evidence. Mr. Rohl alone testified that the agreement was to continue so long as either party carried freight. But Mr. Rohl is an interested witness, and the testimony of Mr. Munson, also an interested witness, is that there was no conversation relative to the duration of the agreement. The record, however, does not present merely the testimony of Mr. Rohl against that of Mr. Munson, but there is a correspondence in evidence. The vice-president of the defendant writes to the plaintiffs that they are forced to discontinue the payment of the commissions after a certain date. Mr. Ceballos answers that he noticed by that letter that the long-standing agreement is to be terminated by a certain date named in the Munson letter, expresses the possibility of their altering their minds, asks whether they consider their letter of termination as final, and trusts that they may find some means of continuance. Later, Mr. Ceballos writes to ask whether there cannot be an appointment made with reference to the cattle business, and to this the defendant answers that they cannot change their decision. The attitude of the plaintiff is

entirely antagonistic to the idea that the defendant was bound by a definite contract, *i. e.*, one which they could not terminate at will upon fair notice. Under all of the circumstances, I advise the submission of the case to another jury.

The judgment of nonsuit should be reversed, and a new trial be granted.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

GEORGE W. DRUMHELLER, Appellant, *v.* THE CITY OF MOUNT VERNON, Respondent.

Mount Vernon — employment of men to aid in the construction of a sewage disposal plant — they must be existing employees of the commissioner of public works.

Section 123 of the charter of the city of Mount Vernon (Laws of 1892, chap. 182) provides: "The said commissioner of public works shall have the power to employ such men as may be required to perform any public work not done by contract and to discharge them, the number to be employed at any one time to be subject to the direction and control of the common council."

The common council of the city passed a resolution relative to a sewage disposal plant, and the employment of Snow and Barber, sanitary engineers, to design and supervise the construction thereof, which provided, among other things, as follows: "The said city to co-operate with the said Snow and Barber by furnishing such data and requisite assistance from the Department of Public Works and City Engineer and other city departments as the said engineers may call for, the services of the Corporation Counsel, and such labor and material and tools as may be needed in digging test-pits and other work where ordinary labor and tools are required."

Snow and Barber having made requisition upon the commissioner of public works for engineering assistants, one Drumheller, an employee of the commissioner, with the latter's knowledge, furnished such assistants at a cost of \$765 from his private office force, and not from his assistants in the city's employment.

Held, that Drumheller was not entitled to recover such sum from the city; That the resolution of the common council contemplated that the engineering assistance was to be furnished from the existing employees of the commissioner of public works;

That the fact that the engineering force was insufficient, owing to the pressure of other public work, did not justify the assumption of power to employ additional assistants.

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APPEAL by the plaintiff, George W. Drumheller, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester upon the decision of the court rendered after a trial at the Westchester Special Term, dismissing the plaintiff's complaint upon the merits, and also from an order bearing date the 12th day of March, 1903, and entered in said clerk's office, denying the plaintiff's motion for a new trial made upon the minutes.

Charles W. Sinnott [William A. Ferguson with him on the brief], for the appellant.

William J. Marshall, for the respondent.

Judgment and order unanimously affirmed, with costs, upon the opinion of Mr. Justice GARRETSON.

The following is the opinion of Mr. Justice GARRETSON delivered at Special Term:

GARRETSON, J.:

The plaintiff is not a city officer, but an employee of the commissioner of public works. It may be presumed that he acted at a fixed compensation, and with other employees of the commissioner was paid from a fund appropriated for the defraying of the expenses incident to the performance of the duties devolved upon that official. That the latter had not unlimited power to subject the city to such expense as he saw fit for the salaries and wages of his subordinates is inferable from section 122 of the charter of the city of Mount Vernon (Laws of 1892, chap. 182), which provides as follows: "The said commissioner of public works shall have the power to employ such men as may be required to perform any public work not done by contract and to discharge them, the number to be employed at any one time to be subject to the direction and control of the common council."

A resolution of the common council passed August 6, 1901, relative to a sewerage disposal plant and the employment of Snow and Barber, sanitary engineers, to design and supervise the construction thereof, provided, among other things, as follows: "The said city to co-operate with the said Snow and Barber by furnishing such data and requisite assistance from the Department of Public Works and City Engineer and other city departments as the said engineers

may call for, the services of the Corporation Counsel, and such labor and material and tools as may be needed in digging test-pits and other work where ordinary labor and tools are required."

Requisition having been made by Snow and Barber upon the commissioner for engineering assistants, the plaintiff, with the knowledge and consent of the commissioner, furnished such assistants from his private office force, and not from his assistants in the city's employ, and his disbursements for their wages amounting to \$765 having been presented to and disallowed by the common council, he now brings this action to recover the amount.

A fair construction of the resolution of the common council leads to the conclusion that it was contemplated that the engineering assistance to Snow and Barber was to be furnished from the existing employees of the commissioner.

This view is confirmed by the language of section 122, above cited, which makes the number of the commissioner's employees subject to the direction and control of the common council.

To hold that the plaintiff can recover in this action and upon the ground of alleged equities arising in his favor because he has acted in good faith, and the city has had the benefit of his expenditures, would be to nullify the salutary provisions of the section, throw down the bar erected thereby and make the commissioner quite independent of the common council in the employment of his subordinates and the payment of their compensation.

There would thus be no limitation upon the commissioner's power to obligate the city.

That the engineering force of the commissioner was insufficient at the time, because of the pressure of other public work, did not justify the assumption of power to employ additional assistants, for it would have been but a simple matter for him to have brought the situation to the attention of the common council and left its solution with that body.

It must also be presumed that the plaintiff acted with full knowledge of the provisions of section 122 of the charter, which thus presented the question of power in his superior, and, therefore, his claim that the employment of additional assistants was a mere irregularity in municipal procedure cannot be sustained.

There should be judgment for the defendant, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. HARVEY HUSTED and Others, Composing a Majority of the Board of Water Commissioners of the Village of White Plains, Respondents, v. THE BOARD OF TRUSTEES OF THE VILLAGE OF WHITE PLAINS, Appellant. (Proceedings Nos. 1, 2, 3.)

White Plains Water Act — the control of the water system is given to the water commissioners — not to the village trustees — the duty of the latter is confined to providing money for its maintenance — authority of the court over public officers.

Under the White Plains Water Act (Laws of 1896, chap. 769) the control and management of the water system is not within the control of the village board of trustees; the sole duty of the latter body is to provide the necessary funds. Where the board of water commissioners certify to the board of trustees that certain sums of money are necessary for the extension or maintenance of the water system, it is the duty of the board of trustees to provide such sum. The board of trustees has no power to require the board of water commissioners to state how they have expended the money which came into their possession, or to determine the necessity of purchasing property which the board of water commissioners contemplate purchasing. In the absence of a direct and sustained charge of illegality, or a direct and sustained charge of fraud, the court has no authority to interfere with public officers in the discharge of their duties.

APPEALS by The Board of Trustees of the Village of White Plains from three orders of the Suprême Court, made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 13th day of October, 1903, in three separate proceedings, granting a peremptory writ of mandamus in each proceeding.

In proceeding No. 1 the writ directs the board of trustees to issue bonds of the said village in the sum of \$12,742.23, for the purpose of purchasing and putting up machinery, piping, laying pipes and hydrants, or for the purpose of constructing, maintaining and operating said water works, and from time to time extending and adding to said works.

In proceeding No. 2 the writ directs the said board of trustees to issue bonds of the village for the sum of \$3,500, and the proceeds to be used by the relators for the purpose of purchasing two new boilers.

In proceeding No. 3 the writ directs the said board of trustees to issue a certificate of indebtedness in the sum of \$2,381.82, for the purpose of meeting the deficiency in the payment of interest on bonds issued, and to meet other necessary expenses incurred by said board of water commissioners in the maintenance of the water system in the village of White Plains.

By chapter 769 of the Laws of 1896 the village of White Plains was empowered to procure by sale or condemnation the water plant of a private corporation which formerly supplied the said village with water, and provision was also made in said law for the maintenance of the said plant.

Henry C. Henderson, for the appellant.

John M. Digney, for the respondents.

Order affirmed, with ten dollars costs and disbursements, on the opinion of Mr. Justice KEOGH at Special Term.

All concurred.

The following is the opinion of Mr. Justice KEOGH delivered at Special Term:

KEOGH, J.:

The language of the statute (which is spoken of by counsel as the White Plains Water Act) shows very plainly that the Legislature intended to keep the maintenance and management of the water system of White Plains outside the control of the village trustees. This desire is most aptly and securely accomplished in every section of the act which deals with the practical control of the water plant and the expenditures of money for its preservation. Sections 3, 4, 5, 6, 9,* 14 and 15 pointedly indicate this intention. Nothing is left to be done by the trustees except to provide the funds, and this is left to them only to prevent confusion in the fiscal system of the municipality and to concentrate in one department a complete record of the public indebtedness.

On the 16th of March, 1903, the water commissioners in pursuance of the statute † certified that the sum of \$12,742 was needed

* Amended by chap. 495 of the Laws of 1900.—[REP.]

† See § 4.—[REP.]

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to buy machines, lay pipes, erect hydrants and for the purpose of extending the water works. On March 25, 1903, the commissioners certified to the board that the sum of \$3,500 was necessary to buy two boilers. The trustees neglected to provide this money, and the reason given is contained in the affidavit of Mr. Travis, which is the only paper submitted in opposition.

I am not able to find in the statute any provision requiring the commissioners to present to the trustees any statement, other than that which they have already presented, showing how they have expended the moneys that came into their possession, nor is there anything in the law authorizing the trustees to decide upon the necessity for the purchase of boilers. Indeed, the statute seems to sedulously take from the trustees the decision of such questions.

In the absence of a direct and sustained charge of illegality, or a direct and sustained charge of fraud, the court has no authority to interfere with public officers in the discharge of their duties.

The application is granted.

DECISIONS

IN

CASES NOT REPORTED IN FULL.

FOURTH DEPARTMENT, MARCH, 1904.

Joseph Breslar, as Administrator, etc., of Felix Dakowski, Deceased, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Judgment and order reversed and new trial ordered, with costs to the appellant to abide event upon questions of law only.—Appeal from a judgment entered in the office of the clerk of Herkimer county on the 26th day of November, 1902, upon the verdict of a jury rendered at a Trial Term of the Supreme Court held in and for said county, and from an order denying the defendant's motion for a new trial, made upon the minutes. The action was commenced on the 16th day of September, 1901, to recover damages sustained by the next of kin on account of the death of plaintiff's intestate, alleged to have been caused solely through the negligence of the defendant.—

MOLLENNAN, P. J.: Practically the only question presented by this appeal is whether or not the plaintiff established upon the trial that his intestate was free from contributory negligence. On the 19th day of August, 1901, plaintiff's intestate was killed by reason of an explosion of dynamite which occurred in the roundhouse or building of the defendant, in which plaintiff's intestate was employed. Such explosion was caused by the negligent storing of dynamite and other combustible material in a building connected with defendant's roundhouse. That the defendant was negligent in storing such material in such building is not disputed. Plaintiff's intestate was an employee of the defendant, engaged in attending to its engines at such roundhouse, and during the night or evening of the accident had charge of such building and of the building in which the explosives referred to were kept. On the night in question the evidence tends to show that a fire occurred adjacent to the building in which the explosives were stored, and that plaintiff's intestate was engaged in and about the fire. That the fire started while the deceased was in charge of the premises in question is undisputed. How the fire started, whether by procurement of the deceased, or whether he used reasonable diligence to prevent the conflagration, is not disclosed by the evidence. We think the evidence wholly fails to indicate whether or not the deceased used reasonable care or prudence, or in fact any care or prudence to prevent the fire from starting, or to extinguish it after it had started. In fact, the evidence is quite as consistent with the theory that plaintiff's intestate started or caused the fire to be started, as that it was started or caused to be started without his agency. The evidence wholly fails to establish freedom from contributory negligence on the part of the deceased, and we think it is essential, in order to entitle the plaintiff to recover, that such proof should have

been made. It is clearly established that the defendant was negligent and was guilty of maintaining a nuisance, but we think such fact does not relieve the plaintiff from the necessity of establishing that his intestate was free from contributory negligence. In this respect the plaintiff wholly failed to establish his cause of action. We, therefore, conclude that the judgment and order appealed from should be reversed. Spring, Hiscock and Stover, JJ., concurred in result upon the ground that the court erred in charging as it did, and in refusing to charge as requested respecting the liability of the deceased to support his mother in Russia. Williams, J., dissented.

Henry Smith, Respondent, v. Lazier Gas Engine Company, Appellant.—Judgment and order affirmed, with costs, upon opinion of Nash, J., delivered at Special Term. All concurred.—The following is the opinion of Nash, J., delivered at Trial Term:

Nash, J.: The defendant moves for a new trial principally upon the ground that the action being upon an express warranty the plaintiff is not entitled to recover, for the reason that no action will lie on a warranty unless the title to the property alleged to have been warranted has fully passed to the buyer. (*English v. Hanford*, 76 Hun, 428.) This point was not made at the trial. The plaintiff's counsel upon the trial referred to his cause of action as one for a breach of warranty. The defendant's counsel moved to dismiss the complaint upon the ground that there had been no evidence of any breach of the warranty set up in the complaint. The complaint does not allege a cause of action upon the warranty. The gravamen of the complaint is non-performance of the contract by the defendant. A copy of the contract is set out in the complaint, by the terms of which the defendant agreed to furnish a gas engine which the defendant warranted would develop twenty-five horse power, for which the plaintiff agreed to pay \$570 and a second-hand steam engine and boiler, which it is alleged was agreed to be taken by the defendant at \$100; that relying upon the warranties contained in the agreement the plaintiff set up said engine in his mill; that relying on said warranties the plaintiff attempted to run and use the said engine, and was unable to use it, and the complaint then proceeds to allege the facts, showing not a breach of the warranty, but a breach of the contract to furnish the engine agreed upon, the removal of the engine from the plaintiff's premises, the expense the plaintiff was put to in setting up the engine, the loss of the use of the plaintiff's mill, and the failure of the defendant to return or pay for the second-hand steam engine and boiler which the plaintiff had delivered to the defendant and claims damages in the sum of \$300. The last subdivision of the complaint

* Trial.—[Rev.]

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is as follows: "Ninth. That the fair rental value of the plaintiff's said grist mill is one hundred dollars (\$100.00) per month, and that by reason of the premises, and of the said breach of warranty contained in said agreement so made as aforesaid, and by reason of the moneys so necessarily expended in and about said gas engine and of the loss of trade and custom and of the loss and depreciation of and in the rental value of plaintiff's said grist mill, said plaintiff has been damaged in the sum of eight hundred dollars (\$800.00)." The plaintiff upon the trial gave evidence tending to establish the allegations of the complaint. No evidence of damages as for a breach of the warranty was given or offered by the plaintiff. The case was not submitted to the jury as an action to recover damages for a breach of the warranty. In the charge to the jury it was stated that in the contract to sell the company warranted the engine to run smoothly and to develop twenty-five horse power. There was no other reference to the warranty in the charge. The case of the plaintiff for a breach of the contract, its non-performance, was stated, and the jury were instructed that if they found that the defendant had failed to establish the defense of a settlement the verdict would be for the plaintiff for such damages as he had sustained, and that would be for the price of the steam engine and boiler, freight, cartage and setting up the gas engine and the value of the use of the mill during the time the plaintiff was not able to use it. There was no exception to the charge either as to the manner of stating the case to the jury or to the instruction as to the damages the plaintiff was entitled to recover. The case having been tried upon what seems to me is the correct theory of the case, I am of the opinion that the verdict should stand. Motion for a new trial denied, with ten dollars costs.

The People of the State of New York ex rel. Gamaliel T. Conine, Appellant, v. The County of Steuben and Others, Respondents.—Judgment and order affirmed, with costs, upon the opinion of Nash, J., delivered at Special Term (reported in 41 Misc. Rep. 590). All concurred.

Sarah M. Rathbun, Respondent, v. Emma G. Dorrance, Appellant, Impleaded with Myron A. Comstock.—Judgment affirmed, with costs. All concurred.

Henry H. Persons and John R. Hazel, as Receivers of the Bank of Commerce in Buffalo, Respondents, v. Mary Helen Brown, Appellant, Impleaded with Jane H. Kruger and Others.—Judgment affirmed, with costs. All concurred.

William F. Sagar, Respondent, v. Oldbury Electro-Chemical Company, Appellant.—Judgment and order reversed and new trial ordered, with costs to the appellant to abide event, upon questions of fact. Held, that the finding of the jury that the defendant was guilty of negligence; that the plaintiff was free from contributory negligence and that the plaintiff did not assume the risks incident to his employment, is contrary to the weight of the evidence. All concurred.

Jennie A. Batty, as Administratrix, Respondent, v. Niagara Falls Hydraulic Power, etc., Company, Appellant.—Order affirmed, with out costs. All concurred.

Julia Fitzgerald, Respondent, v. City of Watertown, Appellant.—Judgment and order affirmed, with costs. All concurred, except Williams, J., dissenting.

Blanche Beckwith and Others, v. New York, Chicago and St. Louis Railroad Company.—

Motion for leave to appeal to the Court of Appeals granted, this court certifying that in its opinion a question of law is involved herein which ought to be reviewed by that court.

Simeon Mather and Others, Respondents, v. Charles G. Yost, Impleaded with George E. Yost, Appellant.—Judgment and order affirmed, with costs. All concurred, except Williams and Stover, J.J., who dissented.

George F. Hennessy, as Sole Administrator, etc., of Catherine Dempsey, Deceased, Respondent, v. The Metropolitan Life Insurance Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

George Hall, Respondent, v. United States Radiator Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

John N. Dunn, Respondent, v. James J. Paton, as Executor, etc., of Harrison Dunn, Deceased, Appellant, Impleaded with Others.—Judgment and order affirmed, with costs. All concurred.

Eber Hagar, Appellant, v. The Buffalo and Susquehanna Railroad Company, Respondent, Impleaded with Others.—Judgment and order affirmed, with costs. All concurred.

Eligio San Donato, Appellant, v. The National Contracting Company, Respondent.—Judgment and order affirmed, with costs. All concurred.

Alcinda Thomas, Respondent, v. City of Watertown, Appellant.—Judgment and order affirmed, with costs. All concurred.

Max Binswanger, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.—Order affirmed, with costs. All concurred.

The People of the State of New York ex rel. William Fowler Dewey, Appellant, v. Leander S. Wright and Others, Assessors of the Town of Perrysburg, in the County of Cattaraugus, Respondents.—Order reversed and assessment ordered stricken from the roll, with ten dollars costs and disbursements of this appeal. Held, that the relator was not a resident of the town of Perrysburg and was not liable to assessment in said town. All concurred.

Minneapolis Trust Company, Appellant, v. Helen Mather, Respondent.—Motion for re-argument denied, with ten dollars costs and disbursements.

Charles E. Crouse, as Administrator, etc., of George N. Crouse, Deceased, Appellant, v. Edward B. Judson, Jr., as Guardian of the Estates of Marlette Crouse and Laura C. Crouse, Infant, and George Nellis Crouse, Appellants, Impleaded with Florence Crouse Clark, Respondent.—Judgment modified by striking out all allowances of costs except to the defendant Florence Crouse Clark, and as to her directing that she recover her taxable costs against the plaintiff herein; and further directing that the defendant Florence Crouse Clark recover of the defendant Edward B. Judson, Jr., the sum of \$19,317.05, being the proceeds of the sale of stock, with interest at three and one-half per cent per annum from August 19, 1898, compounded annually on even hundreds of interest, and as so modified and † affirmed, with costs of this appeal to the defendant Florence Crouse Clark against the plaintiff. All concurred.

Peter Leaf v. New York Central and Hudson River Railroad Company.—Motion to dismiss appeal granted, with costs, including ten dollars costs of this motion.

Patrick Carey v. New York Central and Hudson River Railroad Company.—Motion for

* Trial.—[Rep.]

† Sic.

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leave to appeal to the Court of Appeals denied, with ten dollars costs.

Frank J. Saxton, as, etc., v. James O. Sebring and Others.—Motion to correct printed case on appeal granted, with ten dollars costs, and the printed case directed to be corrected accordingly, but upon condition that the respondents stipulate to set the case down for argument not later than Monday of the fourth week of the present term of this court, at the option of the appellant. In the event of the failure of the respondents to give such stipulation the motion is granted, without costs.

Loren M. Hewit, as, etc., v. Viner J. Hedden and Others, etc.—Motion granted, without costs.

William Hogg and Another, Respondents, v. George T. Hogg and Others, Appellants.—The attorneys for the respective parties to this appeal having without objection entered upon the argument of the case upon the merits, it is unnecessary for the court to decide the motion.

Albert Petri, Respondent, v. Clarence T. Birckett, Appellant.—Judgment affirmed, with costs. All concurred.

Lewis P. Blount, Respondent, v. Syracuse Rapid Transit Railway Company, Appellant.—That portion of the order appealed from reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs to abide event, by requiring the plaintiff to state in his bill of particulars in what respects he claims the car was operated in a reckless, careless and negligent manner, as alleged in the complaint. All concurred.

Jennie A. Blount, Respondent, v. Syracuse Rapid Transit Railway Company, Appellant.—That portion of the order appealed from reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs to abide event, by requiring the plaintiff to state in her bill of particulars in what respects she claims the car was operated in a reckless, careless and negligent manner as alleged in her complaint. All concurred.

In the Matter of the Application of J. Jefferson Ellis, Supervisor of the Town of Western, Respondent, to Compel James R. Waldo, Appellant, to Deliver to Him Records, etc., Appertaining to the Office of Supervisor of Said Town.—Order affirmed, with ten dollars costs and disbursements. All concurred.

The Iron National Bank of Plattsburgh, New York, Respondent, v. Alfred Dolge and Others, Impleaded with Albert M. Mills, as Receiver, etc., of Alfred Dolge and Rudolph Dolge, Lately Copartners under the Firm Name and Style of Alfred Dolge & Son, Appellant.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Ellen Burns, Appellant, v. The City of Buffalo, Respondent.—Judgment affirmed, with costs. All concurred, except McLennan, P. J., dissenting upon the ground that the questions of defendant's negligence and plaintiff's freedom from negligence were questions of fact for the jury. Spring, J., not sitting.

Mary Vent, by Delia Vent, her Guardian ad Litem, Appellant, v. The New York Central and Hudson River Railroad Company, Respondent.—Judgment and order affirmed, with costs. All concurred.

Margaret Mallory and Others v. William Facer and Others.—Motion for reargument denied, without costs.

Electric Vehicle Company, Appellant, v. Weston-Mott Company, Respondent.—Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs to abide event, allowing plaintiff to have an examination and discovery of defendant's books mentioned in the petition,

for the purposes therein set forth, and under such regulations as may be agreed upon or fixed by the court at Special Term, unless defendant furnishes plaintiff within twenty days with a sworn statement disclosing and setting forth the number of steering equipments and devices of the kind described and referred to in the agreement made between the parties hereto dated October 25, 1901, sold by it from time to time. Such statement shall set forth in detail the various dates of sales and the number sold upon each date. All concurred; McLennan, P. J., upon the ground that the plaintiff's attorney stated in open court that he was willing to receive the sworn statement in lieu of an inspection of the books.

Joseph Nellis and Others, as Trustees in Bankruptcy of Alexander D. Williams and Theodore C. Colon, Respondents, v. The National Union Bank, Appellant. (Action No. 2.)—Judgment modified by striking out the sum of \$250 granted as an extra allowance of costs to the plaintiffs, and also by striking out the allowance of interest at the rate of three per cent, upon the sum of \$2,968.02, deposited with the defendant pending the litigation, and as so modified said judgment is affirmed, without costs of this appeal to either party. All concurred.

Joseph Nellis and Others, as Trustees in Bankruptcy of Alexander D. Williams and Theodore C. Colon, Respondents, v. The National Union Bank, Appellant. (Action No. 3.)—Judgment modified by striking out the sum of \$250 granted as an extra allowance of costs to the plaintiff, and as so modified affirmed, with costs. All concurred.

Magdalena Brown, Respondent, v. The Travelers' Insurance Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

F. Seward Hurd, Respondent, v. George M. Taylor, Appellant.—Judgment and order affirmed, with costs. Held, that the question of the illegality of the contract was properly submitted to the jury. All concurred, except McLennan, P. J., and Williams, J., who dissented upon the ground that the evidence conclusively establishes that the agreement under which the plaintiff seeks to recover was a wager contract and was understood by the parties to be such, and that, therefore, the plaintiff is not entitled to recover.

Luther B. Van Kirk, Respondent, v. The Genesee Valley Blue Stone Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

Sarah J. Clark, Respondent, v. George A. Comings, Appellant.—Judgment affirmed, with costs. All concurred.

Home Fire and Marine Insurance Company of San Francisco, California, Appellant, v. Philip E. Klein and Others, Respondents.—Judgment and order denying motion for a new trial upon the minutes affirmed, with costs. Order denying motion for a new trial upon the ground of newly-discovered evidence affirmed, with disbursements. All concurred.

Nellie Graves, Respondent, v. Central New York Telephone and Telegraph Company, Appellant.—Interlocutory judgment affirmed, with costs, with leave to the defendant to plead over upon payment of the costs of the demurrer and of this appeal. All concurred, except Williams, J., dissenting.

Minnie H. Congdon, as Administratrix, etc., of Arthur E. Congdon, Deceased, Respondent, v. The Delaware, Lackawanna and Western Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred.

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Stanley E. Pieles, Respondent, v. The Philadelphia Casualty Company, Appellant.—Judgment and order affirmed, with costs. Held, that while the complaint contains some allegations appropriate only in an action upon contract for services, yet it contains all the allegations necessary to constitute a cause of action for damages for breach of the contract. The cause of action may be regarded by this court as one for damages and the other allegations disregarded as surplusage. The amount of the recovery under the evidence would be practically the same in either form of action. The distinction between the two, under the facts of this case, is technical rather than real. In which all concurred, except McLennan, P. J., who dissented upon the ground that the sole cause of action alleged in the complaint is for services rendered, and the evidence wholly fails to establish it, but only tends to prove a cause of action for damages for a breach of a contract of employment, and, therefore, under the authorities, the plaintiff is not entitled to recover. (*Howard v. Daly*, 61 N. Y. 382; *Weed v. Burt*, 78 id. 191; *Perry v. Dickerson*, 85 id. 345; *Dexter v. Ionia*, 133 id. 551.)

Nettie W. Newgass, Appellant, v. Auburn Loan Company and Willard A. Hoagland, Respondents.—Judgment and order affirmed, with costs. All concurred.

Jacob Vogelgesang, Appellant, v. Susanna Vogelgesang, Sued Herein as Susanna Ledwin, Respondent.—Judgment affirmed, with costs. All concurred.

Joseph H. Ambrose, as President of Father Clements Council No. 189, Catholic Benevolent Legion, Respondent, v. John A. Jardin, Appellant.—Judgment affirmed, with costs. All concurred.

Truman A. Dean, Appellant, v. Lester C. Hobart, Respondent.—Judgment affirmed, with costs. All concurred.

Samuel Packard, Respondent, v. Levi Elsohn, Appellant, Impleaded with Gates E. Rosenthal and Others.—Judgment and order affirmed, with costs. All concurred; Hiscock, J., not sitting.

Catherine Brey, as Administratrix, etc., of Hiram R. Brey, Deceased, Appellant, v. American Malting Company, Respondent.—Judgment affirmed, with costs. All concurred; Hiscock, J., not sitting.

George R. Searle and Others v. Corporation Liquidating Company.—Motion for reargument denied, with ten dollars costs. Motion for leave to appeal to the Court of Appeals denied.

The City Trust, Safe Deposit and Surety Company of Philadelphia, Appellant, v. The American Brewing Company, Respondent.—Judgment and orders affirmed, with costs. All concurred.

The City Trust, Safe Deposit and Surety Company of Philadelphia v. The American Brewing Company.—Motion for leave to appeal to the Court of Appeals from the decision affirming the order denying the motion to set aside and vacate the assessment of damages granted. The form of the order and the questions to be certified under section 190, Code Civil Procedure, to be settled by and before Mr. Justice Williams on two days' notice.

Fidelity Trust Company of Buffalo, as Committee, etc., v. Charles D. Marshall, as Administrator, etc.—Motion for leave to appeal to the Court of Appeals granted and questions certified as presented in the moving papers.

Fidelity Trust Company of Buffalo, as Committee, etc., v. Charles D. Marshall, as, etc.—Motion for leave to appeal to the Court

of Appeals granted and questions certified as presented in the moving papers.

In the **Matter of the Application of Citizens' Trust Company of Utica for Designation as a Deposit Bank.**—Order granted.

Lillie Miner, Respondent, v. The Delaware, Lackawanna and Western Railroad Company, Appellant.—Judgment and order affirmed, with costs. All concurred, except Williams, J., who dissented.

Lillie Miner, Respondent, v. The Delaware, Lackawanna and Western Railroad Company, Appellant.—Order denying motion to set aside verdict affirmed, with ten dollars costs and disbursements. All concurred, except Williams, J., who dissented.

Sarah J. Best, Respondent, v. The City of Buffalo, Appellant.—Judgment and order affirmed, with costs. All concurred; Hiscock, J., not sitting.

John H. Shaper, Respondent, v. Mary E. C. Davis, Appellant.—Judgment reversed and new trial ordered, with costs to the appellant to abide event, upon questions of law and of fact, unless the plaintiff stipulates to reduce the verdict by deducting therefrom the sum of \$108 as of the date of the rendition thereof, in which event the judgment as so modified and the order are affirmed, without costs of this appeal to either party. Held, that the evidence does not satisfactorily establish that the defendant was suffering from the disease claimed by the plaintiff and which warranted a charge of two dollars per day from the 25th day of January to the 16th day of July, 1902, as allowed by the referee. All concurred, except Spring and Stover, JJ., who dissented.

Henry Welll, Respondent, v. Michael Whissel and Philip J. Ferkel, Appellants.—Judgment affirmed, with costs. All concurred.

John Dauer, Appellant, v. Louis Sibus, as Executor, etc., of Catharine Dauer, Deceased, and Others, Respondents.—Judgment affirmed, with costs. All concurred.

Thomas Tindle and Willis K. Jackson, Respondents, v. Clarence T. Birkett, Appellant.—Judgment affirmed, with costs. All concurred.

American Woolen Company of New York, Appellant, v. Benjamin Simons and Amelia Simons, Respondents.—Order affirmed, with ten dollars costs and disbursements. All concurred.

Auburn and Syracuse Electric Railroad Company, Respondent, v. Samuel H. Fuller and Mary Fuller, His Wife, Appellants.—Order affirmed, with costs. All concurred, except Hiscock, J., not voting.

Charles Siler, Respondent, v. The Bath and Hammondsport Railroad Company, Appellant.—Order granting new trial reversed, with costs, and judgment directed in favor of the defendant upon the verdict. Held, that the jury having found the plaintiff was not free from contributory negligence, he was not entitled to recover, even although the defendant was guilty of negligence.

Van De Carr Spice Company, Appellant, v. Frederick Cook and Jacob Gerling, Respondents.—Judgment affirmed, with costs. All concurred.

Elizabeth A. Vinal, Appellant, v. Masonic Life Association of Western New York, Respondent.—Judgment affirmed, with costs. All concurred.

Margaret A. Klos, as Administratrix, etc., of John Klos, Deceased, Plaintiff, v. Buffalo, Rochester and Pittsburgh Railway Company, Defendant.—Plaintiff's exceptions overruled and motion for new trial denied, with costs. All concurred except Hiscock, J., who dissented.

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FIRST DEPARTMENT, APRIL, 1904.

- William Hogg and John W. Kales, Individually and as Executors, etc., of Agnes Hogg, Deceased, Respondents, v. Eliza R. Rose and Others, Impleaded with George T. Hogg, Appellant.—Judgment affirmed, with costs. All concurred, except Spring, J., not sitting. Milton Clarence McIntyre, Respondent, v. Western New York Co-operative Fire Insurance Company of Monroe County, Appellant.—Judgment affirmed, with costs. All concurred.
- Myron S. Allen, Respondent, v. Paul Steffen, Appellant.—Judgment and order affirmed, with costs. All concurred.
- In the Matter of the Petition of Catharine Young for Letters of Administration, etc., of John Young, Deceased. In the Matter of the Petition of Mina Y. Everson for Letters, etc., of John Young, Deceased.—Decree of Surrogate's Court affirmed, with costs. All concurred.
- George Lodge, Appellant, v. Mary De Melt, Respondent.—Judgment of County Court reversed and that of Justice's Court affirmed, with costs in this court and in County Court. Held, that the verdict of the jury in Justice's Court was sustained by the evidence. All concurred.
- The Fidelity Trust Company of Buffalo, N. Y., as Committee, etc., of Ella M. Kean, an Alleged Incompetent Person, Appellant, v. Charles D. Marshall, as Administrator with the Will Annexed of Cyrena M. Berriman, Deceased, Respondent.—Interlocutory judgment and order affirmed, with costs, with leave to the plaintiff to plead over upon payment of the costs of the demurrer and of this appeal. Held, that the decision of the questions involved in this case is controlled by the cases of *United States Trust Co. v. Mutual Benefit Life Ins. Co.* (115 N. Y. 152) and *Walsh v. Mutual Life Insurance Co.* (183 id. 408). All concurred, except McLennan, P. J., who dissented upon the authority of *Amberg v. Manhattan Life Insurance Co.* (171 N. Y. 314), and also upon the ground that it was not the intention of the parties to the contract of insurance that any part of the insurance moneys should be paid to the representatives or assigns of any child of the insured who might die without issue before the death of the insured.
- The Fidelity Trust Company of Buffalo, N. Y., as Committee, etc., of Ella M. Kean, an Alleged Incompetent Person, Appellant, v. Charles D. Marshall, as Executor, etc., of William Berriman, Deceased, and Charles D. Marshall, as Administrator with the Will Annexed of Cyrena M. Berriman, Deceased, Respondents.—Interlocutory judgment and order affirmed, with costs, with leave to the plaintiff to plead over upon payment of the costs of the demurrer and of this appeal. Held, that the decision of the questions involved in this case is controlled by the cases of *United States Trust Co. v. Mutual Benefit Life Ins. Co.* (115 N. Y. 152) and *Walsh v. Mutual*
- Life Insurance Co.* (183 id. 408). All concurred, except McLennan, P. J., who dissented upon the authority of *Amberg v. Manhattan Life Insurance Co.* (171 N. Y. 314), and also upon the ground that it was not the intention of the parties to the contract of insurance that any part of the insurance moneys should be paid to the representatives or assigns of any child of the insured who might have died without issue before the death of the insured.
- Marian Armstrong, Respondent, v. Webster P. Moore and Others, as Executors, etc., of Matthew O'Neill, Deceased, Appellants.—Judgment and order reversed and new trial ordered, with costs to appellant to abide event upon questions of law and of fact, unless the plaintiff stipulates to reduce the verdict to the sum of \$3,000 as of the date of the rendition thereof, in which event the judgment as so modified and order are affirmed, without costs of this appeal to either party. All concurred.
- Neil McMahon, an Infant, Appellant, v. Crucible Steel Company of America, Respondent.—Judgment affirmed, with costs. All concurred, except Spring and Hiscock, JJ., who dissented.
- Walter P. Horne, Appellant, v. Griffin S. Ackley and Helen T. Ackley, Respondents.—Judgment and order affirmed, with costs. All concurred, except Williams and Stover, JJ., who dissented.
- Winiford S. Martin, Appellant, v. John W. Timm and Ernestine Timm, Respondents.—Judgment affirmed, with costs. All concurred.
- Emilie R. Seidenspinner, Respondent, v. Metropolitan Life Insurance Company, Appellant.—Judgment affirmed, with costs, on the authority of same case in this court (70 App. Div. 476). All concurred.
- Sophia Helmer, as Administratrix, etc., of Robert J. Helmer, Deceased, Respondent, v. The Merchants' Co-operative Fire Insurance Association of Central New York, Appellant.—Judgment and order affirmed, with costs. All concurred.
- Helen Thompson, Respondent, v. International Ferry Company, Appellant.—Judgment and order affirmed, with costs. All concurred.
- The People of the State of New York ex rel. George W. Goler, Relator, v. The Board of Supervisors of the County of Monroe, Respondent.—Writ of certiorari to review the determination of the board of supervisors of Monroe county dismissed, with fifty dollars costs and disbursements against relator. All concurred.
- The Maryland Casualty Company, Respondent, v. William C. Burnette, Appellant.—Judgment affirmed, with costs. All concurred.
- Cornelius P. Bucklin, Respondent, v. Buffalo, Attica and Arcade Railroad Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. All concurred.

FIRST DEPARTMENT, APRIL, 1904.

Stephen C. Odell and Frank S. Odell, Doing Business as S. C. Odell & Son, and Rectors, a Corporation, Appellants, v. Charles W. Bretney and Samuel Prince, Individually, and as President of and Representing the Public Owners and Hackdrivers' Association of the Greater New York, Respondents.—Judgment modified by affirming it as to Odells, with costs of appeal against them; and reversing it as to Rectors, and ordering a new

trial as to them, with costs to Rectors, appellants, to abide event.—Appeal from a judgment dismissing the complaint and vacating a temporary injunction.—

P. J. CURIAM: The facts, so far as they are necessary to understand the questions involved, are sufficiently stated in our opinion upon the former appeal from the order granting the injunction *pendente lite*. (*Odell v. Bretney*, 62 App. Div. 595.) There

are two parties plaintiff, one, Rectors, a domestic corporation, and the other S. C. Odell & Son, who, under a license from the city, were maintaining a private hack stand in front of the hotel or restaurant conducted by Rectors. The defendants represent the Public Owners and Hackdrivers' Association of the city. The Rectors hotel premises are situated on the east side of Broadway between Forty-third and Forty-fourth streets. At Forty-third street Broadway makes a junction with Seventh avenue, and within the space between Forty-third and Forty-fourth streets there is a public hack stand authorized to be used by the defendants and there is a license for such use issued by the city of New York. Our conclusion upon the former appeal was that the Special Term was right in the view that the space immediately in front of Rectors Hotel was not within the boundaries of the public hack stand. It was left to be determined upon the trial whether the use of the street in front of Rectors as a private hack stand was one which the city had authority to grant. Upon the former appeal it was shown that S. C. Odell & Son claimed such use of that portion of the street in front of Rectors pursuant to a special license issued by the city which, in terms, authorized them to maintain a private hack stand at that place. Upon the trial in May, 1902, it appeared that the Odells' special stand license had expired, and that they did not at that time nor had they for some previous period maintained such hack stand. Upon this showing, therefore, as the Odells had no right to injunctive relief as against the defendants at the time of the trial, the dismissal of the complaint as to them was right, but, under the circumstances, it should have been without costs. We think, however, that it was error to dismiss the complaint with costs as against Rectors. The street immediately in front of this hotel, we held, was not part of the public hack stand, and using it for such purposes and to the injury and annoyance of Rectors and its guests was an invasion of its rights as the owner of the premises in the use of the street. Our former determination, therefore, from which upon examination we find no reason to depart, favors the view that, as against the acts of the defendants complained of, Rectors was entitled to relief, and hence the complaint as to them should not have been dismissed. The judgment accordingly should be modified by affirming it as to Odells, with costs of appeal against them; and reversing it as to Rectors, and ordering a new trial as to them, with costs to Rectors, appellants, to abide the event. Present — Van Brunt, P. J., Patterson, O'Brien, McLaughlin and Laughlin, JJ. Alfred H. Headley, Respondent, v. James M. Leopold and Alfred M. Leopold, Doing Business as Partners under the Copartnership Name of James M. Leopold & Company, Appellants.—Order affirmed, with ten dollars costs and disbursements to abide event.—Appeal from an order restraining the defendants *pendent lite* from selling certain stocks.—
Patterson, O'Brien, McLaughlin and Laughlin, JJ.: We think that the questions involved should be disposed of at the trial, and not upon affidavits; and without, therefore, considering or passing upon the merits, which should be left until the trial can be had, we think that the injunction order should remain. Accordingly the order appealed from is affirmed, with ten dollars costs and disbursements to abide the event.

Present — Van Brunt, P. J., Patterson, O'Brien, McLaughlin and Laughlin, JJ.
The People of the State of New York ex rel. Donald Grant, Relator, v. Francis V. Greene, as Commissioner of Police of the Police Department of the City of New York, Respondent.—Proceedings annulled and writ sustained and relator reinstated with fifty dollars costs and disbursements.—Writ of certiorari to review determination of the Police Commissioner in dismissing the relator from the police force.—

PATTERSON, J.: The relator, an inspector in the police department in the city of New York, was tried before the deputy police commissioner upon charges and was dismissed by the police commissioner from the force. The charges made against him were substantially the same as those preferred against Police Captain Stephenson, who was also convicted by the police commissioner and dismissed from the force, but who has been reinstated by this court on a reversal of the conviction.* The evidence in the record now before us is, upon the substantial matters involved, identical with that taken before the police commissioner on the trial of Stephenson, and it appears that the record of the evidence taken in the Stephenson case was offered and received as that upon which the findings of the police commissioner were made in the case at bar. The only additional proof seems to consist of the testimony of Police Commissioner Partridge and of the relator himself and of James Haggerty, and some exhibits, which in no way strengthen the case against the present relator. In that state of the record the finding of the commissioner that the relator was guilty of the charges against him must be set aside for insufficiency of evidence to establish any one of the charges upon which the relator was arraigned and tried. The proceedings must be annulled and the writ of certiorari sustained and the relator reinstated in his former position, with fifty dollars costs and disbursements. Van Brunt, P. J., McLaughlin and Laughlin, JJ., concurred.

INGRAHAM, J. (concurring): I concur as concluded by the Stephenson case.

John E. Harper, Respondent, v. Charles E. W. Smith, Appellant, Implicated with United Gold and Platinum Mines Company. Order affirmed, with ten dollars costs and disbursements.—Appeal from an order granting injunction.—

INGRAHAM, J.: The relief asked for by the complainant is that plaintiff have judgment that certain shares of stock of the defendant corporation standing in the name of the defendant Smith as trustee for the plaintiff are owned by the plaintiff as co-owner with the defendant Smith; that the defendant Smith account therefor; that the said shares may not be voted or in any wise disposed of except as may be mutually agreed upon by the plaintiff and said defendant Smith, and that the defendant Smith be enjoined and restrained from exercising an exclusive voting right thereon until the record ownership of the said shares shall be vested in this plaintiff and the defendant Smith jointly, and from selling, assigning, pledging, transferring or otherwise disposing of said shares until the record ownership thereof shall be vested in the defendant Smith and the plaintiff personally, and then only as may be mutually agreed upon by said defendant Smith and the plaintiff, and that the defendant corporation be enjoined and restrained from

* See *People ex rel. Stephenson v. Greene* (92 App. Div. 243).—[Rep.]

receiving or recognizing as valid any vote cast by the defendant Smith personally or by any agent, representative or proxy of his, upon the said shares of stock of the defendant corporation until the record ownership thereof has been vested in the defendant Smith and the plaintiff jointly, and then only as such vote shall be mutually agreed upon by Smith and the plaintiff. The plaintiff and Smith are both non-residents, and the corporation is a foreign corporation organized under the laws of the State of Arizona. All the meetings of the corporation, however, have been held in the city and county of New York, and Smith has heretofore voted on the stock standing in his name as trustee of the plaintiff in the city of New York. It would seem that neither the plaintiff nor the defendant Smith could maintain an action against the defendant company, a foreign corporation, in the Supreme Court of this State, as by section 1780 of the Code of Civil Procedure an action against a foreign corporation can be maintained by a non-resident of the State only when the action is brought to recover damages for the breach of a contract made within the State or relating to property situated within the State at the time of the making thereof, or where it is brought to recover real property situated within the State, or a chattel which is replevied within the State, or where the cause of action arose within the State. The plaintiff, however, has a right to resort to the courts of this State to enforce any cause of action or to obtain any relief to which he is entitled as against the defendant Smith. The order appealed from provides that the defendant Smith, "both personally and by any agent, representative or proxy of his, be and he hereby is enjoined and restrained, during the pendency of this action, from voting upon the 108,000 shares of the common and the 4,190 shares of the preferred stock of the defendant corporation in the complaint referred to, or upon any of them, to the exclusion of this plaintiff, at any meeting of the shareholders of the defendant corporation; that the said defendant Smith, both personally and by any agent, representative or proxy of his, be and he hereby is restrained and enjoined, during the pendency of this action, from selling, assigning, transferring, pledging or otherwise disposing of the said shares or any of them, except only as may be mutually agreed upon by the said defendant Smith and this plaintiff; and that the defendant corporation be and it hereby is enjoined and restrained, during the pendency of this action, from accepting or recognizing as valid any vote offered by the said Smith upon the said shares of stock or any of them, except only as may be mutually agreed upon by the said defendant Smith and this plaintiff." No answer was interposed by either of the defendants, nor does the corporation appear or appeal from the order granting the injunction. As this court has no jurisdiction over the defendant company, a foreign corporation, this injunction, so far as it restrains the corporation, was not justified. We think, however, that a case was made out which justified the court in restraining the defendant Smith, until final judgment, from selling, assigning or transferring the said stock standing in his name and in which the plaintiff claims an interest, and from voting upon the stock against the wishes of the plaintiff in such a way as to imperil the plaintiff's interest if it should be finally determined that he is entitled to an interest in the stock. In the affidavit submitted in opposition to the

motion, the defendant Smith claimed that by virtue of the various transactions between himself and the plaintiff he has become the absolute owner of the stock and entitled to undisturbed dominion over it. That question is to be determined upon the trial of the action, and the order appealed from maintains the existing situation until the real ownership of the stock can be determined upon the trial. The stock stands in the name of Smith as trustee for the plaintiff. Upon the face of the transaction, it would appear that the plaintiff, as the *cestui que trust*, would be entitled to have a voice in the disposition of this stock. The defendant is an Arizona corporation, but it is alleged and not disputed that all the meetings of the directors and stockholders are held in the city of New York. It is apparent that if Smith could dispose of this stock pending the trial of the action, a judgment in favor of the plaintiff, if one should be obtained, would be valueless, as a person purchasing the stock from Smith would probably acquire such a title as against the plaintiff as would render it difficult, if not impossible, for the plaintiff to follow the stock and impress it with the trust in his favor. As the corporation does not meet in the State of Arizona, and as Smith is not there or subject to the jurisdiction of the courts of that State, it would be a denial of justice, while entertaining the plaintiff's application to compel Smith to recognize his interest in the stock, to allow him meantime so to act in relation to the stock as to prevent the plaintiff from obtaining any benefit from the judgment if one should be obtained. Until the question as to the real ownership of this stock is determined, we think the court below was justified in preserving the existing situation, so that any relief to which the plaintiff may be ultimately shown to be entitled can be awarded him and the judgment enforced in this State. If the corporation had appealed, we should have been required to modify the order appealed from so far as the corporation is enjoined, but as there is no appeal by the corporation, it does not appear that the provision enjoining it affects Smith, and we would not be justified in modifying the order, so far as it affects the corporation, on its appeal. It follows that the order appealed from is affirmed, with ten dollars costs and disbursements. Van Brunt, P. J., Patterson, McLaughlin and Hatch, J.J., concurred. Albert A. Manda, Appellant, v. Emilius Etienne, Appellant.—Judgment and order reversed both on the law and the facts, and new trial granted, with costs to defendant to abide the event.—Cross-appeals from a judgment of the Supreme Court, entered upon a verdict in favor of defendant, and from orders denying the motions of the respective parties for a new trial.—

LAUGHLIN, J.: The defendant recovered a verdict upon his counterclaim. Each party made motion for a new trial, and both are dissatisfied with the judgment and appeal. The plaintiff was engaged in the general horticultural business, including the importation of flower bulbs at South Orange, N. J. The defendant was a resident of Ollioules, France, and was a dealer in flower bulbs at that place, purchasing the same from growers in the vicinity. The parties had no personal acquaintance and had had no business relations prior to the 15th day of October, 1896. On that day plaintiff wrote defendant suggesting an arrangement by which he would become defendant's agent for the sale of flower bulbs in this country or the buyer of bulbs from the defendant. The defendant

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replied, declining to employ plaintiff as an agent, but manifesting a willingness to sell bulbs to him. A contract accordingly was thereafter negotiated between the parties by letters and cablegrams. This correspondence resulted in a first shipment of bulbs by the defendant to the plaintiff on the 2d day of July, 1896. The first invoice was received by the plaintiff on the fourteenth day of July, but the bulb did not arrive until the twenty-fifth day of the same month. Upon receiving the invoice the plaintiff refused to accept the drafts accompanying the same upon the ground that the prices were in excess of the contract price and upon no other ground. The goods were consigned through the defendant's agents in New York instead of the brokers named in the contract; but the plaintiff at the time made no objection on this ground, and upon their arrival he demanded the bulbs, offering to accept the drafts at the price according to his understanding of the contract, which was refused. As soon as the plaintiff received the invoice he wrote defendant complaining of the price and requesting in substance that he cable the consignee to modify drafts and deliver at price as claimed by plaintiff. The defendant, upon receiving the plaintiff's protest against the invoice price, refused to modify the terms. Thereupon plaintiff employed counsel who wrote defendant threatening suit and complaining that the goods had not been consigned to the broker designated in the contract; but before the defendant received the letter or had an opportunity to deliver the goods to the other broker the plaintiff on the 28th day of July, 1896, brought this action for damages for breach of contract and attached the first consignment of bulbs and a second consignment, which had arrived in the meantime, delivery of which had been tendered and refused in like manner as the first on the thirtieth day of July. An order for service on the defendant by publication was obtained, but the defendant having arrived in this country, personal service was made on him on the twentieth day of August of the same year. Upon the trial both parties claimed that the terms of the contract became a question of law for the decision of the court; but the court submitted the question to the jury as one of fact, and both parties excepted. The verdict is not in accordance with the claims of either party, and, under the peculiar circumstances of this case, it is impossible to ascertain from the verdict what the jury believed to be the contract. The principal question presented by the appeal is, what was the contract between the parties as to the price of the bulbs, and whether the court erred in submitting the question to the jury as one of fact. After further correspondence between the parties with reference to the terms of a contract, and after the defendant had submitted approximate prices of bulbs for the coming season, subject to change, however, until the crop was well advanced, which would be about February, the plaintiff wrote the defendant submitting a proposed form of contract and expressing the hope that the defendant would reduce the approximate prices later. Pursuant to the request of the plaintiff in his letter of December twenty-fourth, and by cable on the 5th of January, 1896, the defendant on the 10th of January, 1896, cabled the plaintiff with reference to the acceptance of his proposed contract, "Accept, except for the offers of competitors. Letter follows." The agreement proposed by the plaintiff provided that the

prices at which the bulbs were to be invoiced were to be five or ten francs less per thousand than the prices at which bulbs were offered by any of defendant's competitors at Ollioules. On the 11th day of January, 1896, the defendant wrote the plaintiff, refusing to accept the provision of the contract making the price dependent upon the selling prices at which bulbs were offered by defendant's competitors, and stating at length his reasons for rejecting the proposition, which were in substance that the provision was liable to give rise to misunderstanding and to litigation, and the defendant suggested that this clause be changed to read that the defendant would sell the plaintiff bulbs at five francs per thousand less than his competitors, "on condition that the prices of my competitors are given to me by you and confirmed by their own letters which you will send me, and if these prices are given in good faith and in accordance with the prices at which the goods can be bought in this region and it is optional for me to accept or refuse." The plaintiff, after receiving this cablegram and letter, cabled the defendant on January twenty-fourth, accepting the agreement as modified by defendant, and on the same day wrote confirming his cablegram, and also inclosed a schedule of prices which he suggested as defendant's selling price to him, but added that he would not dictate prices to the defendant. At this stage of the negotiations it is evident that the parties had merely come to an understanding by which the defendant was to sell all bulbs ordered by the plaintiff, so far as he could fill the orders, provided the prices at which the plaintiff claimed defendant's competitors were offering the same classes of bulbs were found by defendant to be in accordance with the market prices there at the time of shipment. This is the fair interpretation of his amendment to the contract as proposed by the plaintiff in view of the fact that he distinctly notified the plaintiff that he desired the contract in that regard put in such form that it would not be open to any misunderstanding or litigation. On the twelfth of March thereafter the plaintiff wrote the defendant inclosing his first order for bulbs "at the prices and conditions according to our arrangement and contract" the same to be shipped in July. There had been considerable correspondence between the parties between the twenty-fourth of January and this time; but no change in the contract had been made, and the substance of the correspondence, so far as material, was inquiries on the part of the plaintiff as to the condition of the crop and urging the defendant to fix a definite price on account of the difficulty of contracting for the sale of bulbs here without the price being fixed; and on the part of the defendant, that owing to the drouth the outlook for the crop was growing worse and worse and a warning to the plaintiff against making contracts at fixed prices or for large sized bulbs. Upon the twenty-eighth day of March the defendant wrote the plaintiff stating that he had booked the plaintiff's orders, upon condition, however, that if he should be unable to deliver the specified amount of any particular sized bulbs, owing to their scarcity in the market, he should only be required to deliver so far as able to perform. The plaintiff acknowledged the receipt of this letter and made no objection to the conditional acceptance of the order. Prior to the 28th day of March, 1896, the defendant had, at the instance of the plaintiff, sent the plaintiff different approximate price lists,

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changing as the season progressed and the shortage of the crop became more apparent. The plaintiff insisted upon having the defendant give fixed prices, and finally on the twenty-eighth day of March, with the letter acknowledging and looking plaintiff's order, the defendant inclosed a printed price list, making an express reservation against his inability to deliver the large sizes of Roman hyacinths in the quantity desired. This letter was acknowledged on April twenty-seventh by the plaintiff, who made no objection to the prices quoted, but requested further information as to the exact number of each size and variety of bulbs the defendant would be able to furnish, stating that he would send another order soon, and asked when the defendant intended shipping those already ordered. Between March twenty-eighth, when defendant inclosed the price list to the plaintiff, and the date and receipt of plaintiff's acknowledgment thereof, other correspondence occurred between the parties relating to the question of price, but it was occasioned by communications previously sent. Prior to the twenty-fourth day of March the correspondence between the parties indicated that they were proceeding upon the basis of the formal contract proposed by the plaintiff on December twenty-fourth, as modified at the instance of the defendant. The plaintiff had obtained and transmitted to the defendant prices at which the defendant's competitors were offering to sell various kinds of bulbs, and in that connection drew the attention of the defendant to the fact that those prices were in many instances lower than those quoted by the defendant to the plaintiff in his approximate price lists. The defendant did not assent to the prices of his competitors transmitted to him by the plaintiff, but maintained the position that it would be impossible to sell at those prices owing to the certainty that the crop would be short, and continually asserted that the prices would be higher even than his previous approximate quotations. He apparently became alarmed as to whether the plaintiff, in view of these circumstances, intended to let the order already given stand or forward other orders, and asked the plaintiff in substance whether he could be relied upon to take bulbs from him. On the twenty-fourth day of March the plaintiff wrote the defendant confirming a cablegram in which he stated that the defendant could rely upon him, and that the order had been placed pursuant to the arrangement that he was to receive bulbs at five francs per thousand cheaper than any of defendant's competitors were selling for, and inclosed further quotations of defendant's competitors, calling attention to the fact that they were much lower in many instances than defendant's quotations. On the fifth day of April the defendant, in acknowledging the receipt of this letter, admitted that the quotations of his competitors were lower than his own, but called attention to the fact that they did not bind themselves to deliver, and that they would be unable to deliver at the prices quoted, and referred plaintiff to his letter of the twenty-eighth of March, inclosing fixed prices, and assured the plaintiff that the condition of the crop justified his quotations. In this letter the defendant also advised the plaintiff to take orders as to quantities and sizes of bulbs conditionally, and pointed out the facts necessitating this course. On the thirteenth day of April the defendant, in answer to an inquiry from the plaintiff on April second, inclosing further communications concerning prices, asking about the

condition of the crop and the quantities defendant would be able to furnish, which was received by the defendant after his letter to the plaintiff of April fifth, advised plaintiff in taking orders to be cautious both as to prices and as to sizes and quantities, and informed plaintiff that he had purchased 2,000,000 bulbs at the market price to be established later, which he said would be higher. On the thirtieth of April the defendant wrote plaintiff calling attention to the fact that his letters of March twenty-eighth, April fifth and April thirteenth had not been answered, and expressed the fear that the prices quoted terrified the plaintiff, and also stated that he had been required to give security to perform his contract with the growers, and that his bondsmen required that plaintiff give security to him. This the plaintiff refused to do, upon the ground that it was not required by the contract, and the defendant formally withdrew the request on the second of July; but prior thereto, and on or before the eighteenth of June, he cabled the plaintiff, upon receiving a cablegram from the plaintiff insisting upon holding him to the contract, having reference to defendant's requirement of security, that he would make a shipment, which evidently meant that he would do so without security. In the meantime the defendant wrote on May ninth that he hoped to make the first shipment the first week in July. On May twenty-eighth the plaintiff wrote the defendant to make shipments as soon as possible, and made no further suggestions concerning or with reference to prices or objections to the prices quoted in defendant's letter of March twenty-eighth. Nothing further occurred between the parties concerning the price until after the arrival of the first invoice, as already stated, with the exception that on the twenty-sixth day of May the defendant, in writing plaintiff urging the giving of security, stated that the growers had begun to gather the bulbs and that the prices would be fixed very soon. If the defendant was guilty of a breach of contract in refusing to perform unless the plaintiff would give security, this was waived and is now of no importance. The same is true with reference to the consignment not having been made to the broker designated therefor. The contention of the plaintiff is that he was entitled to have the bulbs invoiced at five francs less per thousand than the prices quoted early in the season by some of defendant's competitors and transmitted by plaintiff to defendant. It would seem, under the circumstances, that the price list forwarded to plaintiff by defendant on the twenty-eighth day of March was acquiesced in by the plaintiff, and that the prices of any bulbs shipped by defendant to the plaintiff were to be determined thereby. The defendant, however, appears to have treated this price list as furnishing the maximum prices, and it may be that the fair construction of the contract in the light of the subsequent correspondence is that it was to be taken in connection with the formal contract, based on plaintiff's letter of December twenty-fourth as modified by defendant's reply, and to be considered merely an assurance or guaranty by the defendant to the plaintiff, for his guidance in taking orders in this country, that the prices to be fixed according to the contract would not in any event exceed the prices submitted on the twenty-eighth day of March. The price at which the defendant invoiced the two shipments of bulbs to the plaintiff was less than the prices quoted in the list inclosed on March twenty-eighth. The invoice price was evidently based on the market price at

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which bulbs of the same kind and size could be bought in the region of Ollioules at the time of shipment, less the frances and percentages specified in the contract. It appears that the defendant exercised the option which he reserved in the contract of December twenty fourth as modified, to fill the order, and the price which he claimed therefor was within the price at which the bulbs could be bought in the vicinity of Ollioules at that time. We are of opinion that the defendant acted within his contract rights in thus invoicing the bulbs, and that he was entitled to the price at which they were invoiced. The plaintiff, therefore, was at fault in declining to accept the bulbs on account of an alleged erroneous price, and the plaintiff, not the defendant, is the one who was guilty of a breach of the contract. This should have been decided as a question of law, and should not have been submitted to the jury. The verdict for the defendant was \$3,000. The first two consignments of bulbs which were attached were subsequently delivered to, and accepted by, the plaintiff. According to the allegations of defendant's counterclaim, this delivery was made by defendant's consent after plaintiff's refusal to accept according to the contract and after he had attached the goods and threatened to sell the same, and according to plaintiff's reply, the delivery was made in fulfillment of the contract. The plaintiff did not allege that the bulbs did not conform to the contract or tender them back to the defendant. In these circumstances the defendant would be entitled to recover on the theory of a delivery and acceptance pursuant to the contract, for the plaintiff having first wrongfully refused to perform the contract by accepting the bulbs at the contract price, and then having accepted them, was not at liberty to claim that the acceptance was otherwise than under the contract. The invoice price of these goods, together with the cost of packing, freight and other charges, which the defendant paid and which the plaintiff was obligated to pay, aggregated the sum of \$19,666.04. The defendant also gave other evidence tending to show other damages in substantial amounts for the plaintiff's failure to accept and pay for the balance of the bulbs ordered and shipped pursuant to the contract. It thus appeared that on the undisputed evidence, according to the contract as we interpret it, the verdict in favor of the defendant was grossly inadequate. The decision of the main question removes from the case many of the questions argued upon the appeal. The other questions that will necessarily arise upon the new trial are the ordinary questions that arise on a breach of a contract to accept and pay for goods; and inasmuch as the evidence upon a new trial may be different, it is neither necessary nor advisable that we should attempt to decide those questions in advance. It follows, therefore, that the judgment and order should be reversed both on the law and on the facts and a new trial granted, with costs to defendant to abide the event. Van Brunt, P. J., Patterson, O'Brien and McLaughlin, J.J., concurred.

Thomas Dennison, as Executor, etc., of John Long, Deceased, Appellant, v. The City of New York, Respondent.—Judgment affirmed, with costs. No opinion.

The People of the State of New York, Respondent, v. George Gordon, Appellant.—Judgment affirmed. No opinion.

Edward Smith, Respondent, v. Maria Anna Herten, Appellant, Impleaded with William Tegner. Judgment affirmed, with costs. No opinion.

Walter Scott, Respondent, v. Charles G. Conn, Appellant.—Judgment affirmed, with cost. No opinion.

Patrick W. Cullinan, as State Commissioner of Excise of the State of New York, Respondent, v. Bernard Reich and Others, Appellants.—Judgment and order affirmed, with costs. No opinion.

The People of the State of New York, Appellant, v. Isaac Heineman, Respondent.—Judgment affirmed on the opinion of *People v. Cohen*, (91 App. Div. 89).

Anton Odendall, Respondent, v. Theodore Haebler and Oscar Faehrmann, Appellants.—Order affirmed, with costs. No opinion.

Frederick S. Robinson, as Trustee, for Mary E. Nelson under the Will of Laura Robinson, Deceased, and Others, Respondents, v. The Manhattan Railway Company and The New York Elevated Railroad Company Appellants Impleaded with George P. Nelson, Individually and as Executor, etc., of Mary E. Nelson, Deceased.—Judgment affirmed, with costs. No opinion.

Edward Cooper and Sarah A. Hewitt, as Executors of and Trustees under the Last Will and Testament of Peter Cooper, Deceased, Respondents, v. The Manhattan Railway Company, Appellant. (Action No. 3.)—Judgment affirmed, with costs. No opinion.

Paul Herman, Appellant, v. John L. Daniels, Respondent.—Judgment affirmed, with costs. No opinion,

William F. Donnelly, Appellant, v. Globe and Rutgers Fire Insurance Company of New York, Respondent.—Appeal from decision dismissed. Interlocutory judgment affirmed, with costs, with leave to plaintiff to amend complaint on payment of costs in this court and in the court below. No opinion.

Edward Crowe, Appellant, v. Dunham Manufacturing Company, Respondent.—Judgment and order affirmed, with costs. No opinion.

Nathan Gershenson, Appellant, v. Jacob Sheikowitz, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

The People of the State of New York ex rel. Antonio La Motta also known as Peter Monroe, Appellant, v. The New York Catholic Protectory, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

W. Wallace Grant, Appellant, v. Pratt & Lambert, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Maria W. Braun, Respondent, v. Isidor Straus and Nathan Straus, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.

Lewis C. Freeman, Appellant, v. Marie S. Wyse, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.

In the Matter of the Application of W. Bayard Cutting, Respondent, to Be Discharged as Trustee under the Last Will and Testament of Charles Kennedy Hamilton, Deceased; Eleanor Margarettte Hamilton, Appellant.—Order affirmed, with costs. No opinion.

Elizabeth Koehler, as Administratrix, etc., of John Koehler, Deceased, Appellant, v. The New York Steam Company, Respondent.—Judgment affirmed, with costs. No opinion.

Otto Erler, Respondent, v. Leon Abbott, Appellant, Impleaded with Raymond W. Kennedy.—Judgment affirmed, with costs. No opinion.

Charles J. Quinn, Appellant, v. New York Bread Company and Others, Respondents.—

- Judgment and order affirmed, with costs. No opinion.
- Bridget Hayes, Respondent, v. William L. Moore, Appellant.*—Judgment and order affirmed, with costs. No opinion.
- In the Matter of the Application of Elizabeth McDermott, Appellant, for the Examination of Andress Floyd and Frank B. Crawford, Respondents. Pursuant to Chapter 9, Title 8, Article 1, of the Code of Civil Procedure.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- The People of the State of New York ex rel. Goetz Silk Manufacturing Company, Respondent, v. James L. Wells and Others, as Commissioners of Taxes and Assessments of the City of New York, Appellants.—Order affirmed, with costs. No opinion.
- Elizabeth H. Valentine, Appellant, v. Gregorio di Lorenzo, Respondent.*—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Henry E. Coe, as Surviving Executor of and Trustee under the Last Will and Testament of Charles A. Coe, Deceased, Respondent, v. Rosditer, MacGovern & Company, Appellant.*—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Frederick Keim v. David C. Townsend.*—Motion denied.
- Leontine Suse v. Bernard Biglin, Impleaded.*—Motion denied, with ten dollars costs.
- Fannie S. Wheeler v. William F. Norton.*—Motion denied, with ten dollars costs.
- George A. Stearns v. Shepard & Morse Lumber Company.*—Motion denied, with ten dollars costs.
- Nathaniel T. Bacon v. Ignatius R. Grossmann.*—Motion denied.
- Mary M. Johnson v. Edward Roach.*—Motion granted.
- Annie Spindler v. Mary E. Gibson and Another.*—Motion granted so far as to dismiss appeal, with ten dollars costs.
- Annie Spindler v. Mary E. Gibson and Another.*—Motion granted so far as to dismiss appeal, with ten dollars costs.
- In the Matter of the Application of The Hammond Typewriter Company, Appellant, for a Substitution of Attorneys in the Place and Stead of Edwin L. Kalish, Respondent, in an Action Entitled John Lairmber, Jr., Plaintiff, v. The Hammond Typewriter Company and Others, Defendants. In the Matter of the Application of James B. Hammond, Appellant, for Substitution of Attorneys in the Place and Stead of Edwin L. Kalish, Respondent, in an Action Entitled James B. Hammond, as Administrator, etc., Plaintiff, v. National Life Association, Defendant.—Order modified by reducing the sum of \$7,588.81, to be paid under the terms of the order, to the sum of \$5,000, and as modified affirmed, without costs of this appeal to either party. No opinion.
- The People of the State of New York ex rel. Atlantic Telephone Company, Appellant, v. Robert Grier Monroe, as Commissioner of Water Supply, Gas and Electricity of the City of New York, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. Laughlin J., dissented.
- Susie E. Montanye, as Administratrix, etc., of Lewis F. Montanye, Deceased, Respondent, v. George E. Montanye, Appellant, Impleaded with Others.*—Judgment affirmed, with costs. No opinion.
- Austin W. Lord v. Washington Hull.*—Motion denied, with ten dollars costs.
- In the Matter of Walter Lutgen and Others.—Motion granted, time extended to July 1, 1904.
- August Pelzel v. Leopold Schepp.*—Motion denied, with ten dollars costs.
- Thomas Farrelly v. Emigrant Industrial Savings Bank.*—Motion denied.
- The People of the State of New York ex rel. Ella Sinclair v. Daniel A. Sinclair.—Motion denied.
- Charles R. Ross v. Bayer-Gardner-Himes Company.*—Motion denied, with ten dollars costs.
- Frederick C. Withers v. The City of New York.*—Motion denied, with ten dollars costs.
- John J. Carle v. George B. Starrett and Others.*—Motion denied, with ten dollars costs.
- Washington Seligman v. Alfred N. Benjamin.*—Appeal dismissed, with ten dollars costs.
- Joseph Williams v. Margaret E. Backus.*—Appeal dismissed, without costs.
- Tompkins McIlvaine v. George Steinson.*—Motion denied.
- Thomas B. Hidden v. Fred S. Godfrey and Others.*—Motion granted so far as to dismiss appeal, with ten dollars costs.
- Annie Spindler v. Mary E. Gibson.*—Motion denied, with ten dollars costs.
- David Perlman v. Moses Bernstein and Another.*—Motion granted as stated in memorandum per curiam.
- Hamilton B. Tompkins v. Morton Trust Company.*—Motion denied.
- In the Matter of Frances Backus.—Motion dismissed. Memorandum per curiam.
- Benjamin C. Mulrhead v. Henry Hollander and Others; Benjamin C. Mulrhead v. Henry Hollander and Others.*—Motions granted, with ten dollars costs of one motion.
- James H. Bellingham v. Mary F. Bellingham.*—Motion granted, with ten dollars costs.
- In the Matter of Herman Holtje.—Motion granted, with ten dollars costs.
- Irving Savings Institution v. Arthur E. Smith and Others.*—Motion granted, with ten dollars costs.
- James O'Brien v. Abbie E. O'Brien.*—Motion granted, with ten dollars costs.
- In the Matter of Alexander E. Orr and Others.—Application granted.
- In the Matter of William J. Meagher.—Attorney suspended for five years. Memorandum per curiam.
- Joseph Williams v. Margaret E. Backus and Others; Joseph Williams v. Margaret E. Backus and Others.*—Appeals dismissed, without costs.
- Sarah M. Orvis, as Executrix, etc., of Thomas Storm, Deceased, Respondent, v. The National Commercial Bank of New York, Successor of the Domestic Exchange National Bank of New York, and Ellsworth Childs, Appellants.*—Judgment affirmed, with costs. No opinion.
- J. Quintus Cohen, as Trustee of the Estate of John T. Lee, Bankrupt, Appellant, v. Mortimer H. Wagar, as President of the Consolidated Stock and Petroleum Exchange of New York, Respondent.*—Judgment affirmed, with costs, on authority of 87 Appellate Division, 256.
- The People of the State of New York ex rel. Joseph H. M. McKeown, Relator, v. Francis V. Greene, as Police Commissioner of the City of New York, Respondent.—Writ dismissed and proceedings affirmed, with costs. No opinion.
- Salomon Landau, as Administrator, etc., of George Landau, Deceased, Appellant, v. The City of New York, Respondent.*—Judgment affirmed, with costs. No opinion. Patterson J., dissented. Motion for leave to go to the Court of Appeals granted.
- William C. Browning, Respondent, v. Benjamin W. Stillwell, Appellant.*—Judgment and order affirmed, with costs. No opinion.
- John P. Hale, Jr., Appellant, v. The City of New York, Respondent.*—Judgment affirmed,

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- with costs, on authority of *People v. Rich*, 38 Appellate Division, 60.
- Annette E. Winehill*, Respondent, v. Consolidated Gas Company of New York, Appellant.—Judgment and order affirmed, with costs. No opinion.
- David Porter Bingley*, Appellant, v. Jacob A. Stein and Louis Korn, Respondents.—Judgment affirmed, with costs. No opinion.
- John H. Somers*, Respondent, v. Oscar J. Gude, Appellant.—Judgment affirmed, with costs. No opinion. *Ingraham*, J., dissented.
- G. Felix Gregory*, Respondent, v. D. O. Haynes & Company, Appellant.—Judgment affirmed, with costs, with leave to defendant to withdraw demurrer and to answer on payment of costs in this court and in the court below. No opinion.
- Gaetano Variano*, an Infant, by Pasquale Variano, his Guardian ad Litem, Respondent, v. The City of New York, Appellant.—Judgment and order affirmed, with costs. No opinion.
- Everett N. Blanke*, Respondent, v. The Evening Post Publishing Company and Others, Impleaded with Commercial Advertiser Association and Others, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- W. & J. Sloane*, Respondent, v. Royal C. Peabody, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Victor Henry Rothschild*, Appellant, v. Isaac Dreyfus, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Martin J. Waters*, Respondent, v. Ralph L. Spencer, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- The People of the State of New York ex rel. Robert S. Peterson, Appellant, v. Francis V. Greene, as Police Commissioner of the City of New York, Respondent.—Writ dismissed and proceedings affirmed, with costs. No opinion.
- In the Matter of the Application of Thomas F. Devine, Appellant, for an Order Directing and Requiring Lawrence P. Mingey, an Attorney, Respondent, to Pay Over Money Collected by Him as Attorney for said Thomas F. Devine.—Order affirmed, with ten dollars costs and disbursements. No opinion.
- Achibald A. Hutchinson* v. John W. Simpson and Others.—Motion denied.
- Lincoln National Bank* v. Carl Fischer-Hansen.—Motion denied, with ten dollars costs.
- Howard Caldwell and Another* v. J. Walter Labarre and Another.—Motion granted so far as to dismiss appeal, with ten dollars costs.

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Eugene Carley, Appellant, v. Robert Gair, Respondent.—Judgment unanimously affirmed, with costs.—Appeal by the plaintiff, Eugene Carley, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 13th day of February, 1902, dismissing the complaint at the close of the plaintiff's case on a trial before the court and a jury.—

Hirschberg, P. J.: The plaintiff was injured while working for the defendant at a machine for corrugating paper. The machine was supplied with three rollers or cylinders, between which the paper passed in the process of corrugation. Its operation was controlled by a lever which, when pushed up, cut off the power, and started the machine again when pushed down. On the day of the accident the machine became clogged and stopped its motion owing to the fact that too much paper was put in, and while the plaintiff was engaged in clearing it of the excess of paper, apparently without having first cut off the power, it started suddenly, drew his hand between the rollers and inflicted the injury complained of. The plaintiff produced but one witness besides himself on the subject of the operation of the machine, and proved by him that the machine was out of order, so that it would occasionally start even when the power was cut off. If the plaintiff had made it clear that the power had been cut off at the time of the accident this evidence would have required a submission of the case to the jury. But the plaintiff's evidence on this point, while somewhat obscure, tends strongly to the conclusion that he failed to stop the machine when it became clogged, and that it started up again when he relieved it from the tension of the paper, which he did with his fingers. His witness testified as follows: "If the machine is clogged it would stop itself if it was enough paper in there. In a stoppage of that kind the force of

the belt could not overcome it, because of the stoppage of the machine in that way, because of the pressure between the cylinders. It would slip on the driving wheel of the machine and do nothing. It was apparent to anybody that the machine, as soon as you would relieve it, it would start itself with the belt. Just as soon as you remove that paper then the machine would go, because it hadn't been shut off. Therefore, if it got clogged, it was the duty of the operator to cut here and throw the wheel—throw this off and stop the machine. That was apparent to anybody, so in the working of this machine, if the paper got clogged between the lower and the middle cylinder, or if it got clogged between the middle and the upper cylinder to such an extent that it would stop the machine, it was the apparent duty of the operator immediately to turn off his power, then he could work as long as he wanted to in pulling out this paper; there is nothing about that machine that you cannot see at once, you can see everything, you can see how the wheels go. This is about the simplest form of turning on and off power." The plaintiff in recounting the accident testified as follows: "On this 29th day of May, 1900, we started in the morning and I pulled the paper to the roll, and I let it go, and then the machine got nearly three-quarter—the machine stopped there, the paper stopped up in the roll. Q. You say you had to stop the machine by pushing the lever up? A. Push her yes, to stop. Q. Did it stop then? A. Yes, this time it stop itself. When it stopped I looked in the machine—the rollers of the machine—when it stopped up with the paper, and I tried to pull that paper in the roll. One roll going that way, I took my hands to pull up the paper. I saw a lot of paper in the roll stopping her up. The rolls are going one this way, and one the other way. It stopped with a lot of paper, and I tried to clear that

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roll. Then the machine started itself and smashed my fingers off. The machine started itself. I did not pull the machine or do anything to make it start. After the machine started, as I have described it to the jury, my fingers were caught." On cross-examination he testified: "Q. * * * After the paper came through between the first and second roller did you stop the machine? A. I stopped that machine—Mr. McCrossin: I submit the witness talks very poor English at best and should not be cut right off whenever he tries to answer. The court: The witness has that difficulty and some allowance must be made. If you think the testimony is not correct you may try and correct it on the re-direct. We must do the best we can." Notwithstanding this suggestion of the court, no attempt was made by redirect examination or otherwise to furnish an explanation of what the answer was to be which the plaintiff's counsel himself apparently interrupted. The plaintiff was afterwards recalled by his counsel as a witness, but no attempt was made to prove by him that he turned the power off after the machine stopped itself and before he attempted to remove the paper which had clogged it. The plaintiff admitted full knowledge of the risk which would exist in an endeavor to clear the cylinders with his bare hands while the power was on, and his right to recover was dependent upon affirmative proof that he did not negligently incur that risk by a failure to throw off the power by the simple process of pushing up the lever which was supplied for that purpose. He was instructed in the use and operation of the machine before he went to work upon it alone, and he was told by his instructor, to quote his own testimony, "to take up the lever if in trouble, stop, push it up, and if I want to start, pull down." He did indeed testify generally "I stop that machine when I clean it," but he not only gave a clear account of his actions when on the occasion of the accident the machine stopped itself by stating that when it stopped he tried to pull the clogging paper away without the remotest suggestion of first shutting off the power, but throughout the entire trial no question was asked him on the subject of the shutting off of the power as a preliminary step to the attempt to clean it. As the proof was permitted to stand the utmost that can be said of it is that it affords room for a bare inference that the accident was not due in part at least to the plaintiff's negligence. It was his duty, however, to have furnished clear and positive proof on that branch of the case, and his failure to do so justifies the disposition of the action made at the trial. The judgment should be affirmed.

Bose Seifert, Respondent, v. Maurice Meyer, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event.—Appeal by the defendant, Maurice Meyer, from a judgment of the Supreme Court, entered upon the verdict of a jury in favor of the plaintiff in the office of the clerk of the county of Westchester on the 6th day of June, 1902, and also from an order entered in said office on the 17th day of May, 1902, denying the defendant's motion for a new trial made upon the minutes.—

Hirschner, P. J.: The purpose of this action is the recovery of a sum of money which the plaintiff charges the defendant with negligently investing for her. The defendant is an attorney at law and was acting at the time of the investment under the authority of a power of attorney executed by the plaintiff. The investment was made upon

the security of the promissory note of a theatrical manager, Oscar Hammerstein, payable on demand, bearing his wife's indorsement, and accompanied with an assignment of the box office receipts of two theatres in the borough of Manhattan then under his management. There would be little, if any, difficulty in affirming the judgment and order if the verdict rested solely upon the character of the investment, but the defendant asserted upon the trial that the loan was made with the plaintiff's knowledge and express approbation, and that a written agreement to the transaction was executed by her with Hammerstein. This she denied, asserting that her signature to the agreement was forged by or on behalf of the defendant, and the evidence on this contention seems to me to so fairly preponderate in the defendant's favor that I am constrained to the conclusion that the verdict was the result of some misconception, bias or prejudice on the part of the jury. The plaintiff is one of four sisters for whom the defendant appears to have transacted business many years without a complaint or cause of complaint save in the present instance. The business included the conduct of litigation as well as the investment of funds, and it was established beyond question that the sisters were in the habit of signing each other's names to law papers and even to bank checks. The defendant testified that Hammerstein's application for a loan and the nature of the security he proposed to furnish were fully and fairly explained to the plaintiff by him; and that she agreed to the loan of the money upon condition that a bonus of \$100 be paid by the borrower, to which the borrower assented; that he, the defendant, thereupon caused the written agreement to be prepared, to which reference has been made, embodying the terms of the transaction, and which was executed by Hammerstein on October 6, 1897, together with the note and the assignment of the box office receipts; that the agreement so executed by Hammerstein was handed by the defendant to the plaintiff to sign in his office on the following day, on which day she came there with her sister Mary for that purpose; that it was signed with the plaintiff's name while he was engaged in consultation with another client in an adjoining room, and that it was then delivered to him by the plaintiff and remained in his possession until some time in the spring or summer of 1901, when his power of attorney was revoked by the plaintiff and this document with the plaintiff's other papers in his possession was turned over to her new attorney, her present counsel. The plaintiff and her sister Mary denied knowledge of the agreement, and denied that either had signed the plaintiff's name to it. In the voluminous record of the trial may be found corroborating evidence on either side of the issue of fact thus presented, but the expert evidence offered established beyond question that the signature of the plaintiff is in form in the handwriting of her sister Mary, and if it be genuine the inference is inevitable that it was legitimately appended to the paper by Mary on October 7, 1897, at the defendant's office in the plaintiff's presence and with her sanction and consent. The theory of the plaintiff upon the trial and upon this appeal is that the signature was forged by the defendant or in his office by some one in his employment, and that by mischance an indorsement of a check written by her sister Mary in the plaintiff's name, then in the defendant's possession, was used in making the necessary simulation. There is no doubt that checks

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with endorsements of the plaintiff's name so made by her sister were at that time among the papers in the defendant's possession, and in this connection the evidence given at the trial by Mary on the subject of her use of the plaintiff's name is of some significance as bearing upon the value to be attached to her denial of the genuineness of the signature in question. "By Mr. Haff: Q. Did you ever sign checks for Rose Seifert; did you ever sign Rose Seifert to checks? A. No, sir; not to checks. By the Court: Q. To anything? A. No, sir; she does her own writing. Q. Did you ever sign her name to anything? A. No, sir; never did. No occasion to do it. By Mr. Scheuerman: * * * Q. Now, don't you know; haven't you at some time or other, indorsed Rose's name to a check that has been given to you? A. No, sir. Q. Or receipt or letter, or anything of that kind, indorsement on a bond? A. No, sir. * * * Q. * * * Now, don't you think you have indorsed checks in the name of Rose Seifert, possibly? A. Well, that may — * * * Q. Haven't you cashed checks for her where you have taken the check and given her the money, and then indorsed her name? A. That may have been years ago. Q. That is what I am speaking of. Now, take in 1897, don't you think possibly that in 1897, you may have signed her name to a check? A. Oh, I may have, certainly." The plaintiff's counsel asserts in the brief presented in this appeal that the probability is that the signature of the plaintiff to the agreement was written by one of the defendant's clerks. The counsel was himself a clerk in the defendant's employment at the time of the occurrence, and he testified at the trial that the defendant asked him to sign the plaintiff's name to the agreement, but that he refused to do so, not that he was asked to imitate her signature, but that the defendant claimed the right to sign the name by virtue of the power of attorney which he held, and the witness based his refusal upon the assertion that such a power could not be delegated. The amount of the loan, exclusive of the bonus, was \$2,000. Hammerstein failed soon after the loan was made, but payments have been made by him from time to time, amounting in all to \$700, and the money has been turned over to the plaintiff by the defendant. The money loaned was obtained from two mortgages belonging to the plaintiff which were paid off in the fall of 1897, and in the monthly statement which was rendered by the defendant to the plaintiff under date of November 1, 1897, he charged himself with the amount of these mortgages and distinctly credits himself with the amount of the loan in question as "Cash, loaned Oscar Hammerstein, on note and agreement." It thus becomes a settled fact in the case that the plaintiff knew of the loan on November 1, 1897, and that it was made on a note and agreement, but she claims that she understood that the words "note and agreement" meant that the money was loaned upon a mortgage. Why she so understood she does not explain. Indeed, she testified that the defendant's authority was expressly limited to the investment of her money upon bond and mortgage, but several circumstances tend to greatly weaken the force of her claim in this regard. The power of attorney contains no such limitation; the verified complaint alleges that the defendant under the authority conferred by the power of attorney "invested by way of mortgage and otherwise all her money and property;" and it appears that on many occasions her

money was invested by the defendant upon promissory notes with her knowledge and concurrence. The plaintiff's counsel left the defendant's office and employment in November, 1900. The defendant says he was discharged. The counsel says he left voluntarily. In April following the plaintiff decided to change her attorneys, and she accordingly caused a written notice to that effect to be served upon the defendant revoking his power of attorney and directing him to turn over to her new attorney all her papers and documents, agreeably to which direction as I have said the Hammerstein agreement was shortly afterwards delivered with other papers by the defendant to the plaintiff's counsel. The weight of evidence is with the defendant on the main issue, irrespective of the positive testimony on either side, because it is difficult to accept the plaintiff's theory that the agreement was forged in the manner in which she contends that it was. The theory requires credence to be given to several unlikely things. That a professional man of good reputation who had for many years without wrongdoing transacted business with a client involving the annual handling and investment of thousands of dollars should conceive the idea of committing a heinous and wholly unnecessary crime without apparent adequate motive; that he should assign to a clerk having no motive whatever such as commonly may be assumed to inspire criminals the task of committing the crime in his service, and that such task should be unhesitatingly undertaken; that he should permit this crime to be so bunglingly done that for the purpose of forgery an undoubtedly genuine signature annexed to the power of attorney in his possession should be overlooked and one heedlessly selected which had not been written by the person whose name was to be forged; that immediately upon the consummation of the crime he should serve upon the victim what must be regarded as the equivalent of written notice of its commission; and that upon demand he should deliver the evidence of the crime to her counsel, known to him to be inimical and possibly cognizant of the crime because he had been asked to some extent at least to participate in the transaction; these and other matters connected with them are surely calculated to challenge credulity and certainly require strong and convincing evidence to justify their acceptance as the truth. The alternative involves no necessary suggestion of perjury on the part of either the plaintiff or her sister Mary. So many years have elapsed since the investment that they might easily persuade themselves that the disastrous loan was made without their knowledge, the more readily since the principal party did not sign the agreement. An honest mistake in the giving of their testimony is quite within the possibilities. Nor is it intended in this opinion to decide that they are wrong in fact and that the agreement was executed with their knowledge. The decision of that question must of course rest finally with a jury, which is both the constitutional and the best tribunal for its determination. But in view of the gravity of the accusation made against the defendant, the contradictory nature of some of the evidence, the improbabilities which have been pointed out, and other features of the case which it is not deemed necessary to comment on in detail, I conclude that a new trial should be granted in the interests of justice. The judgment and order should be reversed. All concurred.

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Dennis E. Norton and Patrick Gorman, Appellants, v. Thomas M. Farley, Respondent.— Judgment of the Municipal Court reversed and new trial ordered, costs to abide the event.—Appeal by the plaintiffs, Dennis E. Norton and Patrick Gorman, from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, in favor of the defendant, entered on the 25th day of November, 1903, dismissing the complaint.—**HIRSCHBERG, P. J.:** The dismissal of the complaint was at the close of the plaintiffs' case, not upon the merits, but for failure of proof. I think the justice took too narrow a view of the plaintiffs' evidence. The action appears to have been brought to recover an alleged balance of \$191.35 on a bill for services performed in the sum of \$640.35, on which the defendant paid the plaintiffs \$449.10 before the commencement of the action. It appears by the evidence that the services in question consisted of the furnishing by the plaintiffs to the defendant of a certain number of trucks and a certain number of laborers by the day, to be used by the defendant in the performance of contract work in which he was then engaged. The answer comprises a general denial, and as an additional defense that the payment of the \$449.10 was in compromise of the plaintiffs' claim of \$640.35, and in accord and satisfaction. The parties stipulated that the plaintiffs might put in evidence their bill of particulars in support of their claim, and it was accordingly offered and received without objection. It is not returned, and this court has no knowledge of the items contained in it, but it may be properly assumed from the oral proof that the items amount to the sum of \$640.35, and consist of charges by the day for trucks and laborers furnished by the plaintiffs to the defendant, and used by him in the performance of his contract. It did appear on the cross-examination of the plaintiffs' witness, the appellant Dennis E. Norton, that he did not personally know that the trucks and laborers remained each day in the service of the defendant after they were so furnished, for he was only at the work from a half an hour to an hour and a half daily. In view of the apparent nature of the claim this want of knowledge is of no significance, but there are other details in respect to which his knowledge was hearsay, and which might have been fatal had the case been tried in the usual way without a stipulation to save time by the reception of informal proof. It did appear, however, that the bill rendered to the defendant was an exact copy of the bill of particulars; that the defendant made no objection to it, and promised to pay it if time were allowed him. In the circumstances, the evidence was *prima facie* sufficient to establish the plaintiffs' claim. The judgment should accordingly be reversed. All concurred.

Andrew F. Jayne, Appellant, v. Mary F. Brown, Respondent.— Judgment affirmed, with costs, on the opinion of Mr. Justice Wilmot M. Smith at Special Term. All concurred. The following is the opinion of Mr. Justice Wilmot M. Smith handed down at Special Term:
SMITH, J.: The plaintiff has failed to establish to my satisfaction that there was any agreement or understanding between himself and daughter, either express or implied, that she should convey the property in question to him upon his request. No witnesses were present when the alleged agreement was made, and the denial of the defendant that said agreement was made is quite as credible as the testimony of the plaintiff, and more thoroughly and satisfactorily cor-

roborated by the conceded facts in the case. If such oral agreement was made it contravenes the Statute of Frauds and will not be enforced by a court of equity unless the failure to do so would work fraud upon the plaintiff. Both in a legal and moral sense the equities of the case are with the defendant. The plaintiff formerly had title to the property, but suffered it to become so heavily encumbered that it was foreclosed and the title became vested in the mortgagee, the Mutual Life Insurance Company of New York. I am satisfied that had it not been for the personal efforts of the defendant she would not have obtained title to the property. The plaintiff furnished \$400 of the purchase money, but it was the proceeds of property, the title to which was in the defendant, and there is nothing in the case from which it may be determined that the title to that property became vested in her under such circumstances that the plaintiff had any legal claim upon the proceeds of its sale. The \$400 was not sufficient and the defendant secured a loan upon her personal bond and a second mortgage from Mr. Dutcher. The plaintiff had also solicited a loan from Mr. Dutcher, but it is apparent from the testimony that had it not been for the defendant the loan would not have been made by him. The plaintiff parted with nothing upon the faith of this alleged agreement, and incurred no personal obligation. It is apparent that since the defendant took the title and went into possession she has consistently used and claimed the property as her own. She has sold portions of it without consultation with the plaintiff; has kept it up and paid the taxes and interest, and with true filial spirit has maintained her father and mother on the premises. The property has increased in value since she took title thereto and that probably furnishes an explanation for the cause of this litigation. Under all the circumstances of the case to now deprive the defendant of the property would work a grave injustice to her, and I decide that the complaint must be dismissed upon the merits, with costs.

John Higgins, Respondent, v. Sarah C. Powell and Others, Appellants. Impleaded with Others.— Judgment affirmed, with costs. No opinion. All concurred.

Lottie Crocker, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.— Order affirmed, with costs. No opinion. All concurred.

Patrick Donahue, Respondent, v. Daniel Keehan and Another, Appellants.— Motion for leave to go to the Court of Appeals granted, and question certified.

Edward Seemann, Respondent, v. Central Brewing Company, Appellant.— Judgment and order unanimously affirmed, with costs. No opinion.

John Noon, Respondent, v. Sarah Croghan, Appellant.— Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.

Charles J. Warren, Respondent, v. James Stikeman and Harry L. Stratton, Appellants.— Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.

Charles Goldstein and Aaron Zelenko, Appellants, v. Josephine Mentrup, Respondent.— Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.

Mary A. Melges, Appellant, v. Raymond Hoagland, Respondent.— Judgment affirmed, with costs. No opinion. All concurred.

Nicholas Smith, by his Guardian ad Litem, Catherine Smith, Respondent, v. Jose Berre King and George R. King, Appellants.—

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- Judgment and order unanimously affirmed, with costs. No opinion.
- Michael J. Cronin, Appellant, v. Rosalia Kassten, Respondent.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Philip Schneider, Respondent, v. High Ground Dairy Company, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Frank Jarvis, Respondent, v. High Ground Dairy Company, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Michael J. Bartley, Respondent, v. Patrick J. Walsh, Appellant.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Julia E. Eldert, Respondent, v. William B. Stewart and Mary G. Stewart, Appellants.—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- The People of the State of New York, Respondent, v. Charles H. Dahl, Appellant.—Judgment of conviction affirmed. No opinion. All concurred.
- John J. Barry, Respondent, v. Village of Port Jervis, Appellant.—Judgment and order unanimously affirmed, with costs, on argument, with leave to the appellant to appeal to the Court of Appeals, if so advised.
- In the Matter of the Application of Arthur Leon Webb for Admission to the Bar.—Application granted.
- William J. Hamilton, Respondent, v. Paulding Farnham, Appellant.—Judgment affirmed, with costs. No opinion. All concurred.
- Maria Hibbittes, as Administratrix, etc., of Roderick Hibbittes, Deceased, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.—Judgment unanimously affirmed, with costs. No opinion.
- Rocco Marino, Respondent, v. Interurban Street Railway Company, Appellant.—Judgment of the Municipal Court unanimously affirmed, with costs. No opinion.
- Helen Huber and Others, Appellants, v. Franklin B. Case, Jr., and Others, Defendants. William H. D'Estere, Purchaser, Respondent. (Motion No. 1.)—Order affirmed, with ten dollars costs and disbursements, on opinion of Huber v. Case (*ante*, p. 479). All concurred.
- Martin C. Dreher, Respondent, v. Gloversville Felt Company, Appellant.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Thomas Brady and William Hauptmann, Appellants, v. Anna E. Lyon and Lillian V. Parker, Respondents.—Judgment so far as appealed from and order granting extra allowance, affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Rosetta Corn, Respondent, v. Julia Levy and William Hyams, as Executors, etc., of Philip Levy, Deceased, Appellants.—Interlocutory judgment reversed, with costs, and plaintiff's demurrer to the second separate defense overruled, with costs. Opinion by Bartlett, J.* All concurred.
- In the Matter of the Probate of the Will of Robert E. Hopkins, Deceased. Fanny W. Hopkins, Appellant; Robert E. Hopkins, Jr., Respondent.—Order of the Surrogate's Court of Westchester county affirmed, with ten dollars costs and disbursements. Opinion by Bartlett, J.* All concurred.
- Francis P. Martin, Respondent, v. Ambrose A. Gavigan Company and the Dominican Con-
- vent of Our Lady of the Rosary, Appellants.—Appeal dismissed, with costs.
- In the Matter of the Application of the Brooklyn Bar Association to Punish Benjamin E. Valentine, an Attorney. We think that a further investigation by this court of the first charge against the respondent should be deferred until the criminal prosecution in Nassau county involving that charge is terminated. (*Rochester Bar Association v. Dorothy*, 152 N. Y. 596.) As to the other charges in this proceeding, a reference will be ordered to Honorable James Troy, under section 66 of the Code of Civil Procedure.
- Zachariah T. Allison, Respondent, v. The Long Clove Trap Rock Company, Appellant.—Motion denied.
- The People of the State of New York ex rel. Minnie R. Masten, Respondent, v. William H. Maxwell, as City Superintendent of Schools of the City of New York, Appellant.—Motion granted and reargument ordered for Friday, April 23, 1904.
- Charles Stelnacker, Respondent, v. The Hills Brothers Company, Appellant.—Motion denied.
- William J. Fitzpatrick, Respondent, v. Patrick Fox and Catherine Fox, Appellants.—Motion granted and order ressettled.
- The People of the State of New York ex rel. William F. McCabe and Another, Relators, Respondents, v. Charles A. Matthies and Others, Respondents, Appellants.—Motion denied.
- The McCall Company, Appellant, v. John R. Eagan, Respondent.—Motion denied.
- Peter Quinn, Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—Motion denied.
- George E. Jones, Respondent, v. The Brooklyn Heights Railroad Company, Appellant. Athalia Jones, Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—We do not consider that the determination of the appeals from the orders in these cases affects the question which it is suggested in the moving papers was raised and determined upon the trials of the cases as to the admissibility of the release as evidence upon the measure of damages; and these motions are, therefore, denied.
- Robert Lawson, Respondent, v. William McMurtrie Speer, Appellant.—Motion denied.
- Frank Chvatal, Respondent, v. V. J. Hedden & Sons Company, Appellant.—Motion denied.
- Hamilton J. Davis, Appellant, v. Clementine M. Silverman, Respondent.—Motion denied.
- In the Matter of the Voluntary Dissolution of Malcom Brewing Company. In re Henry Doscher, Creditor, Appellant.—Motion denied.
- Genie H. Campbell, Respondent, v. Albert Friedlander and Others, Appellants.—Motion denied.
- Conrad Wolpers, Jr., an Infant, by his Guardian ad Litem, Conrad Wolpers, Respondent, v. New York and Queens Electric Light and Power Company, Appellant.—Motion denied.
- Frank L. Magar, Appellant, v. Stoddard Hammond and Edward Tompkins, Respondents.—Order modified so as to allow the plaintiff the fees for the term in January, 1900, of the witnesses Vandemark, Tuthill, Ingraham, Wood, Rampe, Fitzgerald, Holt, Vaughn, Hartig, Johnston and Dougherty, and as modified affirmed, without costs. No opinion. All concurred.
- Harvey Medical College, Respondent, v. Fred C. Cocheu, Appellant.—Judgment reversed

* A motion for reargument having been made, this opinion is withheld from publication.

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- and new trial granted, costs to abide the event, for error in ruling in the exclusion of evidence at folios 46 to 48 inclusive in the printed case on appeal. All concurred.
- Laura A. Haack, Appellant, v. The Brooklyn Labor Lyceum Association and Others, Respondents.**—Judgment reversed and a new trial granted, costs to abide the event, on the opinion in *Haack v. Brooklyn Labor Lyceum Assn.* (ante, p. 49). All concurred.
- Nettie Butler, Respondent, v. Michigan Mutual Life Insurance Company, Appellant.**—Judgment and order affirmed, with costs. No opinion. All concurred.
- Mark C. Meagher, Appellant, v. Oliver Lyman Tunis and Julia E. Tunis, Respondents.**—Interlocutory judgment affirmed, with costs, on the authority of *Gilbert v. York* (111 N. Y. 544). All concurred.
- In the Matter of Catherine Bringolf.**—Judgment affirmed by default, with costs. All concurred.
- William O. Miles, Respondent, v. Francis H. Leggett & Company, Appellant.**—Judgment of the Municipal Court affirmed by default, with costs. All concurred.
- Rudolph T. Silbern, Agent, Respondent, v. Harry Relamer, Appellant.**—Judgment of the Municipal Court affirmed by default, with costs. All concurred.
- Charles H. Hutwelker and Others, Respondents, v. Samuel L. Bruck and Mendel Schulman, Appellants.**—Judgment of the Municipal Court affirmed by default, with costs. All concurred.
- Ellen C. Osborn, Respondent, v. Howard J. M. Cardeza and Others, Appellants.**—Motion granted and order resented.
- In the Matter of Acquiring Title to Church Avenue, from Flatbush Avenue to Brooklyn Avenue, Twenty-ninth Ward, Borough of Brooklyn.**—Motion granted and order resented.
- David I. Hoage, Respondent, v. Frank E. Linn, Appellant.**—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- Hyman Sussman and Alexander Sussman, etc., Appellants, v. Samuel Uster, Respondent.**—Judgment of the Municipal Court affirmed, with costs. No opinion. All concurred.
- The People of the State of New York ex rel. David H. Burnett and Another, v. Willis D. Van Brunt, President, and Henry H. Post and Others, Trustees, etc.**—The People of the State of New York ex rel. Mary A. Van Allen and Another v. Willis D. Van Brunt, President, and Henry H. Post and Others, Trustees, etc.—Motions denied on condition that the relators print and prepare the papers so that these matters may be argued at the next term of this court.
- Frederick Dinger, Plaintiff, v. The City of New York, Defendant.**—August Dinger and Josephine Dinger, Plaintiffs, v. The City of New York, Defendant.—Motion to dismiss the appeals denied on condition that the defendant be prepared to argue the cases at the next term of this court and pay ten dollars costs in each case. Cases ordered on the next calendar on compliance with this stipulation.
- In the Matter of the Application of the Brooklyn Bar Association to Punish Eugene R. Hayne, an Attorney.**—Order of reference to William Watson, Esq., under section 68 of the Code of Civil Procedure.
- In the Matter of the Application of Franz J. Torek, Respondent, for the Examination of Patrick M. Hannigan, Appellant.**—Motion denied, with ten dollars costs.
- James Coote, as Administrator, etc., Appellant, v. The Williamsburgh Savings Bank and Another, Respondents.**—Motion denied.
- Margaret Rooney, Respondent, v. Martin R. Bodkin and Others, Appellants.**—Motion granted and order resented.
- William Jewell, Respondent, v. City of Mount Vernon, Appellant.**—Motion for rearrangement denied, with ten dollars costs.
- John J. Boston, Respondent, v. Abraham Abraham and Others, Appellants.**—Motion for leave to appeal to the Court of Appeals denied, and proceedings stayed for ten days to enable appellants to make application to a judge of that court if so advised.
- Eliza C. Pardington, Respondent, v. Abraham Abraham and Others, Appellants.**—Motion granted and order signed.
- Matilda Nelson, as Administratrix, etc., Respondent, v. William Young, Impleaded, etc., Appellant.**—Motion for rearrangement denied, with ten dollars costs. Motion for leave to appeal to the Court of Appeals denied, without costs.
- Marietta Plum, Respondent, v. Metropolitan Street Railway Company, Appellant.**—Motion for rearrangement denied, with ten dollars costs. Motion for leave to appeal to the Court of Appeals denied, without costs.
- Anson Cassavoy, Respondent, v. William J. Pattison, Appellant.**—Motion for rearrangement denied, with ten dollars costs. (See *Case v. Sherman*, 61 Hun, 472.)
- Thomas A. Ennis and Another, Respondents, v. Maurice Untermeyer, Appellant.**—Motion for rearrangement denied, with ten dollars costs. Motion for leave to appeal to the Court of Appeals denied, without costs.
- Thomas M. Delaney and Another, Appellants, v. Garret A. Bouse, Respondent.**—Motion for rearrangement denied, with ten dollars costs. Motion for leave to appeal to the Court of Appeals denied, without costs.
- Lottie Crocker, Appellant, v. The Brooklyn Heights Railroad Company, Respondent.**—Motion to resettle order granted, except so far as the proposed amendment requires costs of the appeal to be paid.
- George W. Ray, Appellant, v. James Mahoney, Respondent.**—Motion denied, with ten dollars costs.
- Joseph Clarke, as Administrator, etc., of Anne Clarke, Deceased, Respondent, v. Elizabeth B. Welsh, Appellant.**—Motion denied.
- James D. Roman, Appellant, v. Edmund K. Taylor, Respondent.**—Motion for rearrangement denied, with ten dollars costs.
- Charles J. Warren, Respondent, v. James H. Stikeman and Another, Appellants.**—Motion for rearrangement denied, with ten dollars costs.
- Thomas Fitzpatrick, Respondent, v. James Butler, Appellant.**—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Peter De Witt, Respondent, v. Lawyers' Advertising Company, Appellant.**—Order affirmed on argument, with ten dollars costs and disbursements. All concurred.
- Charles F. Darlington and John S. Jenkins, Respondents, v. William T. Washburn and Emma J. Richardson, Appellants.**—Order affirmed on argument, with ten dollars costs and disbursements. All concurred.
- Frank Seiden, Appellant, v. Hyman Epstein, Respondent, Impleaded, with Another.**—Order affirmed on argument, with ten dollars costs and disbursements. All concurred.
- In the Matter of the Application of the Prudential Insurance Company of America for a Writ of Mandamus Against the Hon. William J. Gaynor, one of the Justices of the Supreme Court, to Compel Him to Settle and Sign a Case on Appeal, etc.**—This application must be denied on the ground that the case on appeal, alleged to have been presented to Mr. Justice Gaynor for signature,

SECOND DEPARTMENT, APRIL, 1904. [Vol. 93, App. Div.]

under rule 35 of the General Rules of Practice, did not set out the exhibits or the substance thereof. An appellant cannot be required to print the case on appeal as corrected and settled by the trial judge to entitle him to have it signed and ordered on file; but if it includes any exhibits the substance thereof must be stated in the case or the exhibits must be set out in full, if the trial judge so direct. It is apparent from the statement of Mr. Justice Gaynor, in answer to the motion arising upon the order to show cause herein, that he is entirely willing to sign and order on file a manuscript or typewritten case prepared in accordance with his corrections, if it contains such exhibits. We have no doubt that the appellant, upon complying with this requirement, can obtain from him the desired signature and order, under rule 35 of the General Rules of Practice.

In the Matter of Peter J. Elting, as Trustee, etc., of Abijah Curtiss, Deceased.— Motion granted and order resettled, so as to provide that the costs of the appeal be paid to the trustee out of the undivided principal of the trust fund now held by him.

Rosetta Corn, Respondent, v. Julia Levy and William Hyams, as Executors, etc., of Philip Levy, Deceased, Appellants— Motion

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In the Matter of the Probate of the Will of Robert E. Hopkins, Deceased.— Motion for reargument granted, and case set down for argument on May 31, 1904.

Joseph Straub, Respondent, v. Metropolitan Street Railway Company, Appellant.— Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulate to reduce recovery of damages to the sum of \$750, and extra allowance proportionately, in which case the judgment and order as modified are unanimously affirmed, without costs of this appeal to either party. No opinion. The People of the State of New York ex rel. William F. McCabe and John Duffy, Relators, Respondents, v. Charles A. Matthies and Others, etc., Respondents, Appellants.— Motion granted.

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CONSPIRACY — *Refusal of railroad companies to handle grain from an independent elevator on the same terms as grain from elevators controlled by an elevator association — it is unlawful — the railroad company and the elevator association are liable to the owners of the independent elevator for the damages sustained by them.]* All of the grain elevators located at the port of Buffalo having railroad connections are owned, some by railroad companies whose roads enter Buffalo and the others by individuals or corporations. The elevators owned or controlled by the railroad companies are located adjacent to their respective tracks, while most, if not all, of the other elevators are located upon, or connected with, the Buffalo Creek railroad. The Buffalo Creek railroad is simply a branch railroad designed to afford connection with the other railroads and it makes a uniform charge for each car delivered to such other railroads. All of the elevators are absolutely dependent upon such other railroad companies for the transhipment of their grain by rail

In 1900 the owners of all the rail elevators at Buffalo, with the exception of the owner of the Kellogg elevator, formed a joint stock association known as the Western Elevating Association. The agreement for the organization of the association provided that the parties thereto should devote their respective elevators to the purposes of such association; that the association should elevate all grain consigned to any of the elevators in the combination for one-half a cent per bushel, which was less than the price authorized by law; that the net profits of the elevating should be distributed among the parties to the agreement in accordance with a schedule of percentages agreed upon, and that "In case of the failure to come into the Association of any elevator or elevators named in said schedule, then and in that case the percentage of net earnings allotted to such elevator or elevators shall be divided *pro rata* according to per cent shown, between the other elevators in the Association."

Simultaneously with its organization, the association entered into a contract with each of the railroad companies, which provided that the railroad company would pay to the association one-half a cent per bushel for all grain transported by it, independent of whether such grain was handled by the association elevators or by the Kellogg elevator. The railroad companies, in order to reimburse themselves for the one-half cent per bushel which they agreed to pay to the association elevators on grain handled by the Kellogg elevator, adopted the following plan: They added elevator

CONSPIRACY — *Continued.*

charges of one-half a cent a bushel to the freight charges on all grain carried by them, and then paid over the elevator charge to the elevator association, and in case the owners of the Kellogg elevator insisted on receiving one-half a cent a bushel for elevating grain, then such grain was made to pay elevator charges of one cent a bushel. The result of these conditions was to deter shippers of grain from using the Kellogg elevator, and it appeared that this was the purpose intended by the elevator association and the railroad companies.

Held, that the act of the railroad companies in refusing to handle grain from the Kellogg elevator upon the same terms that they handled grain from the other elevators, although the Kellogg elevator was as conveniently situated as the other elevators, was unlawful, and that, as such refusal was the natural result of the contracts entered into between the elevator association and the railroad companies and the result contemplated by the parties when they entered into such contracts, the elevator association and the railroad companies were equally liable for the damages sustained by the owners of the Kellogg elevator in consequence of the unlawful discrimination;

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See SESSION LAWS.
- *Of wills.*
See WILL.

CONTRACT — *Agreement by a second mortgagee to bid in the mortgaged property for the benefit of the mortgagor at a foreclosure sale under the first mortgage — it does not impose an obligation to complete the sale by paying the amount of the bid and to hold the title for the mortgagor's benefit — its effect on a second sale — effect of letters written between the parties — no confidential relation creating a trust ex maleficio.]* 1. In an action brought by Brooke Mackall and Jennie W. Mackall, his wife, against Jacob Van Vechten Olcott and Laura I. Olcott, his wife, to establish a trust in certain real property and to compel the defendants to account to the plaintiffs, it appeared that in 1898 the property in question was owned by Mr. Mackall and was subject to a first mortgage for \$65,000 held by one Harrison, and to a second mortgage for \$5,000, which Mrs. Olcott had taken at the instance of Mrs. Mackall, who was an intimate friend; that an action to foreclose the first mortgage was brought, and that Mr. Olcott agreed to bid in the property at the sale, and thus afford the Mackalls an opportunity prior to the time fixed for the completion of the sale of procuring a new loan and of thus protecting their equity in the property.

Olcott did bid in the property and gave the Mackalls notice to that effect and offered to assign his bid to them if they could raise the necessary amount of money. Neither Mackall nor Olcott was able to raise the money in time to make compliance with the terms of sale, and a resale of the property was had upon which Olcott again bid in the property.

CONTRACT—Continued.

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After the resale Olcott wrote Mrs. Mackall the following letter: " You probably know by this time that I have again bid the property in for \$72,500, and have put up a deposit of \$2,500 in cash. The title must be passed on the 30th of December. When I bid the last time I received a number of offers to purchase the property, so that the entire indebtedness on the first and second trust deeds would be paid and leave some slight balance over; although my counsel in Washington advises me that the title under these sales in a purchaser is absolutely good, you can appreciate that there is no disposition on my part to desire to make any money on any purchases. Will you not write to me forthwith as to the exact amount of money that you would sell the property for, in case it is under your control entirely? In other words, please give the lowest cash figure. I did my utmost pending the time between the last sale and the actual closing of the title, to make arrangements to borrow sufficient to (complete) my purchase, but was unable to do so. I certainly do not wish to make another default, but with equal certainty I do not desire to do anything that you will not approve of."

The Mackalls failed to raise the amount necessary to complete the resale. Olcott raised the necessary money and took title to the property. It was not claimed that Olcott had been guilty of any fraud.

Held, that Olcott's obligation to the Mackalls with respect to the first sale was simply to bid in the property and thus afford the Mackalls an opportunity of raising the necessary moneys prior to the time fixed for the completion of the same, and that upon the failure of the Mackalls to raise such moneys it was competent for Olcott to do so and to take title to the property for his own benefit;

That the obligation, if any, which Olcott assumed towards the Mackalls in respect to the resale of the property, was not any greater than the obligation assumed by him in respect to the first sale thereof, and that, consequently, Olcott acquired by his purchase of the property on the resale the same title as any other purchaser;

That the evidence did not establish any express or implied agreement on the part of Olcott to bid in the property upon the resale and hold the same for Mackall's benefit;

That letters written by Olcott, after he had sold the property, in which he expressed a willingness to create a trust in favor of Mrs. Mackall for the amount of the profits realized upon such sale, did not furnish any evidence establishing an agreement that Olcott was to bid in the property for the protection and benefit of Mackall;

That such an agreement could not be established by letters written by the Mackalls after the transaction;

That no confidential relation existed between the Olcotts and the Mackalls which could be treated as creating a trust *ex maleficio* in favor of the latter.

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2. — *To furnish fire insurance at certain rates—what constitutes a rescission thereof by mutual consent—consideration therefor.]* December 24, 1896, a firm of fire insurance brokers made an agreement in writing with a firm of merchants, by which the insurance brokers agreed to procure for the merchants all the fire insurance which the latter should require for a period of three years from February 1, 1897, at the rate of eighty-three cents per hundred dollars in valuation.

At the time the contract was made there was a tariff association composed of seventy per cent or more of the fire insurance companies doing business in the State of New York, which fixed uniform rates of insurance and from time to time changed the same.

The rate specified in the contract was seven cents per hundred less than the rate fixed by the tariff association. The contract provided that if, during the term thereof, the rate should be reduced by the tariff association, the merchants should have the benefit of the reduction; that if the rate should be increased, the brokers should furnish the insurance at the contract rate.

April 28, 1898, the tariff association was dissolved with the result that there was a decided lowering in the rates of insurance.

After the dissolution of the tariff association, the merchants requested the insurance brokers to lower the rate of insurance specified in the contract,

CONTRACT — *Continued.*

stating that one Tynberg had offered them insurance at the rate of twenty cents per hundred. The insurance brokers then informed the merchants that if they could get Tynberg to obtain the execution of an agreement and guaranty prepared by the insurance brokers, the merchants might give Tynberg their insurance.

The merchants then, in the presence of the brokers, wrote a letter to Tynberg to the effect that if he signed the contract and obtained the guaranty inclosed therein, they would place their insurance with him, but, at the suggestion of the insurance brokers, the part relating to placing insurance with Tynberg was altered to read, "We will then take the matter seriously into consideration."

Tynberg having executed the contract, and obtained the guaranty as suggested, the merchants notified the insurance brokers that they would give their insurance to Tynberg. The brokers then, for the first time, claimed that the contract with Tynberg should be for their account and claimed that the proposition made to Tynberg was simply for the purpose of convincing the merchants that Tynberg's offer was not made in good faith.

Thereafter, during the term of the contract, the merchants placed their insurance with Tynberg. The insurance brokers then brought an action against the merchants to recover damages for the alleged breach of the contract.

Held, that the dissolution of the tariff association did not dissolve the contract;

That, notwithstanding that the merchants could procure insurance at a lower rate than that specified in the contract, the insurance brokers could, if they had so elected, have required the merchants to take insurance and pay therefor at the rate specified in the contract;

That the evidence produced by the merchants, if true, established a rescission of the contract by mutual consent;

That the consideration for such rescission was the release of each party from liability under the contract and the fact that the merchants were induced to negotiate with Tynberg. *TANENBAUM v. JOSEPH*. 341

8. — Oral agreement contemporaneous with a written contract — when it may be proved — delivery of a life insurance certificate in accordance with an oral agreement, not disturbed although the oral agreement be illegal.] The general rule that no oral prior or contemporaneous agreement can be received in evidence to impeach, vary or in any way affect the terms of a written contract, is subject to the qualification that any independent fact or collateral parol agreement, whether contemporaneous with or preliminary to the main contract in writing, may be proved, provided it does not interfere with the terms of the written contract, though it may relate to the same subject-matter.

Andrew H. Hamblen and his wife executed a written agreement, by which they agreed to give to Lewis German all the property which they then had and to will to him all the property which they might have at their death, in consideration of German's agreement to pay Hamblen's debts and to support him and his wife until their death.

At the time of the execution of the agreement, Hamblen owned, among other things, a seat in the New York Produce Exchange, which had been pledged to a bank as collateral security for a loan. The certificate, while of little financial value of itself, carried with it a right on the part of Hamblen's wife, if she survived him, and on the part of his next of kin, if she did not, to a gratuity fund amounting to \$9,000 or \$10,000. German agreed, by his contract, to pay the dues on the seat in the Produce Exchange and upon the insurance attached to it.

After the execution of the contract, Hamblen paid with money given to him by German the loan for which the seat on the Produce Exchange had been pledged as collateral and delivered the certificate thereof, which had previously been assigned in blank, to German. Hamblen claimed that he said nothing whatever at the time he delivered the certificate to German, while German claimed that Hamblen said at that time, "This belongs to you; this is yours."

German retained possession of the certificate and paid the dues and assessments accruing thereon until 1902, when Hamblen's wife died. The death of Hamblen's wife having terminated German's prospect of ever receiving

CONTRACT — *Continued.*

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any portion of the gratuity fund, he refused to pay any more dues and assessments thereon and claimed the right to sell it.

In an action brought by Hamblen against German to obtain possession of the certificate, and to require German to pay all the assessments and dues accruing upon it during Hamblen's life, it appeared that the defendant, in his answer, claimed title to the certificate under the written agreement, but also claimed title generally by virtue of the transfer and delivery by the plaintiff to him of the certificate assigned in blank.

Held, that if the plaintiff had made an oral agreement to transfer the certificate in question to the defendant, and, in pursuance of such agreement, had voluntarily delivered the certificate to the defendant in accordance with the terms of such oral agreement, the defendant would acquire a good title to the certificate notwithstanding the fact that the oral agreement was invalid and that the defendant could not have legally compelled the performance thereof. **HAMBLEN v. GERMAN**..... 464

4. — *To pay a portion of the profits realized on a sale to the party introducing the purchaser — when an action brought by such party to recover his full share of the entire profits is premature*] March 8, 1900, the L. D. Garrett Company, a corporation engaged in the business of buying and selling stocks of insurance companies entered into the following contract with one Hart: "In consideration of One dollar and services to be performed by you, as hereinafter stated, we hereby agree to pay you one-fifth of any profits (after deducting all expenses) which we may realize from the sale of any insurance company or the sale of any insurance company's stock to any person, persons, corporations or their managers that you may name or introduce to us or our representative or firm within thirty days from this date. The said payment of one-fifth to be made to you *as soon as we receive our compensation or commission*. If paid to us by note, or otherwise, due at any future time, we agree to pay your share in cash, less the usual bank discount."

The contract did not limit the right of the Garrett Company to fix the terms of the contracts which it might make with purchasers.

Through the efforts of Hart, the Garrett Company sold the stock of the Orient Fire Insurance Company of Hartford, Conn., to the London and Lancashire Fire Insurance Company, realizing a nominal profit of \$143,000. Seventy-seven thousand dollars of this sum was paid to the Garrett Company, of which \$62,500 was chargeable to the expense account. The contract between the London and Lancashire Fire Insurance Company and the Garrett Company provided that the former company should be entitled to retain in its possession, out of the \$143,000 payable to the Garrett Company, the sum of \$65,000 for a period of three years as a guaranty that certain assets of the Orient Fire Insurance Company would realize a certain amount.

June 25, 1900, the Garrett Company paid Hart \$6,500 and the parties executed the following instrument: "Received upon within contract the sum of Six Thousand and Five hundred Dollars (\$6,500). The balance under this contract, if any found to be due, shall be determined and paid to the within named A. W. Hart within (90) ninety days from the date hereof by said L. D. Garrett Co., the said A. W. Hart reserving all his rights under this contract."

No determination of the amount due to Hart was made within the ninety days mentioned in the contract.

In October, 1900, Hart brought an action against the Garrett Company to recover the further sum of \$21,500, upon the theory that the defendant had made a profit of \$143,000 upon the transaction and that plaintiff was entitled to one-fifth of that amount.

Held, that the action was prematurely brought;

That the plaintiff was only entitled to share in the amount of profits actually realized and received by the defendant either in the way of payment or of something equivalent to payment. **HART v. GARRETT CO.**..... 145

5. — *Agreement by a grantee of premises to pay for lumber used upon the premises — consideration — when the person supplying the lumber may enforce such agreement*] January 18, 1896, Edson B. Sawdy conveyed to his wife, Emma A. Sawdy, premises which had been conveyed to him in November, 1895. Upon the original instance and request of the said Edson B. Sawdy a firm of lumber dealers sold and delivered upon the premises between Decem-

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ber 9, 1895, and March 26, 1896, a quantity of lumber. Of the total amount, lumber of the value of \$705.87 was used in the construction of buildings upon the premises after they had been conveyed to Mrs. Sawdy, and the evidence was sufficient to sustain a finding that the lumber was so used with the consent of Mrs. Sawdy.

May 6, 1896, when the balance due to the lumber dealers amounted to \$320.91, Mrs. Sawdy and her husband executed a warranty deed of the property to George Wing, and in purported consideration thereof and as part of said transaction the latter executed an agreement whereby he agreed to "assume and pay all valid claims for labor and for all material used by first parties (the Sawdys) for the construction of houses and buildings thereon and to save and protect first parties harmless from each and all said claims or demands thereon." Annexed was "an approximate statement of the claims for labor and materials furnished * * * and * * * intended to be assumed by second party," included in which was the sum due to the lumber dealers.

In an action brought by the lumber dealers against Wing to recover the balance of their claim, the evidence tended to establish that at the time the premises were conveyed to him the lumber dealers could have filed a mechanic's lien against the premises.

Held, that the plaintiffs, so far as they claimed under Edson B. Sawdy, were not entitled to recover, as at the time the premises were conveyed to the defendant, the said Edson B. Sawdy did not have any interest in the premises which would serve as a consideration for the defendant's agreement to pay the plaintiffs' claim;

That the plaintiffs, so far as they claimed under Mrs. Sawdy, were entitled to recover; that the fact that at the time the defendant made the agreement to pay the plaintiffs' claim, the plaintiffs might have filed a mechanic's lien against the premises, considered in connection with the fact that Mrs. Sawdy executed a warranty deed to the defendant under which she could be called upon to protect the defendant against the mechanic's lien, gave her such an interest in having the plaintiffs' claim paid as entitled the plaintiffs to enforce the agreement made by Mrs. Sawdy with the defendant for their benefit;

That the fact that the plaintiffs did not avail themselves of the right to file a mechanic's lien did not affect their right to enforce the defendant's agreement. *HURD v. WING.*

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6. — *Providing for the payment of a debt due to a third person — when enforceable by the latter — when a provision for the payment of ten per cent interest upon the debt does not render the contract usurious — a party repudiating all liability upon a contract cannot take advantage of conditions precedent contained therein — offer of firm books in evidence.]* Thomas J. Flagg, who was a copartner of Henry G. Fisk, died intestate, leaving him surviving his widow, Cornelia C. Flagg, and a son and daughter. At the time of his death there was due from the firm to Emily Kennedy, the mother of Cornelia C. Flagg, the sum of \$24,651.82. For the purpose of avoiding a liquidation of the firm affairs, the said Cornelia C. Flagg, individually and for her mother, and the son and daughter of the said Thomas J. Flagg, entered into a contract with Henry G. Fisk, the surviving partner, by which they sold and assigned to him the firm business, with the right to continue the use of the firm name, in consideration of Fisk's agreement to pay to the said Cornelia C. Flagg, individually, the sum of \$3,000, and to pay to the said Emily Kennedy the amount which appeared to be due to her upon the firm books, together with interest thereon at the rate of ten per cent for a certain period and at the rate of six per cent thereafter. The contract provided that Emily Kennedy's claim should not become due and payable until all the other firm creditors had been paid.

In an action brought by Cornelia C. Flagg, as administratrix of the said Emily Kennedy against Fisk's personal representatives to recover the amount of the Kennedy claim,

Held, that the provision in the contract for the payment of ten per cent interest upon the amount of the Kennedy claim did not render it usurious, as the consideration for Fisk's promise to pay the Kennedy claim was the sale of the copartnership business and the right to continue such business in

CONTRACT — *Continued.*

the firm name without liquidating the partnership affairs, and not the loan or forbearance of the use of money, to which, alone, the statute relating to usury applies;

That the interest which the plaintiff, as a party interested in the estate of Thomas J. Flagg and as the sole heir at law and next of kin of Mrs. Kennedy, had in securing the payment of the debt due to the latter, was sufficient to entitle Mrs. Kennedy, or her personal representatives, to enforce the promise to pay such debt;

That, as the defendants had repudiated all liability upon the contract, the fact that the plaintiff failed to show that there were no outstanding firm debts remaining unpaid at the time of the commencement of the action did not constitute a defense;

That, as the existence of the debt and the amount thereof had been established by the firm ledger, independent of its recognition in the contract, the court properly declined to permit the defendants to offer in evidence all of the firm books. *FLAGG v. FISK*..... 169

7. — *Agreement by a manufacturer of a patented article to pay royalties to the inventor — construction thereto.]* The inventor of a bicycle lamp made an agreement with a manufacturing corporation, by which such corporation agreed to manufacture and sell the lamps and pay him a royalty of twelve and a half cents upon each lamp so manufactured and sold. The agreement further provided that the corporation "hereby further promises and agrees that the royalty on lamps shall not in any year net the party of the first part (the inventor) less than Five hundred dollars (\$500), and in the event of said royalty netting the party of the first part less than Five hundred dollars (\$500), or in the event of the discontinuance by the party of the second part of the manufacture or sale of lamps embodying the improvements claimed in said patents, and for which the said party of the second part is liable for royalty, then the said party of the second part hereby promises and agrees to forthwith assign the said patents above referred to, and all rights thereunder, except as hereinbefore specified, to said Corbet, party of the first part, without other consideration than the release from paying further royalty or royalties.

"It is mutually understood and agreed that the failure of the party of the second part to pay the minimum amount of royalty named, or the discontinuance of the manufacture or sale referred to, shall not relieve the party of the second part from the payment of such royalty or royalties as may be due the party of the first part at the time of such termination of the contract and assignment of the said patents to the party of the first part."

Held, that it was optional with the corporation to discontinue the manufacture and sale of the lamps;

That if it did discontinue such manufacture and sale, or if the number of lamps manufactured and sold by the corporation in any year was not sufficient to produce a royalty of \$500, the inventor was entitled to a reassignment of the patents;

That the corporation was not obliged to pay the inventor a minimum of \$500 per annum as royalty until such time as it reassigned the patents to him; that it was only obliged to pay him a royalty of twelve and a half cents upon each lamp manufactured and sold by it.

Semblé, that the corporation could not abandon the manufacture of the lamps, and, by tendering the inventor \$500, hold the patents and thus prevent the inventor from placing his invention upon the market.

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8. — *Agreement to assist in procuring State contracts by using influence with public officers — it is void as against public policy.]* A contract made between a contracting firm, which contemplated submitting competitive bids for canal contracts to be let by the State of New York, and a person, who, for some years, had been engaged at Albany in, as he expressed it, protecting corporations against "strike" legislation, by which the contracting firm agreed to pay to such person one third of the profits which it might realize upon all canal contracts secured by it, in consideration for which such person agreed, by means of his political and social relations and influence with officers of the State of New York, to secure for the contracting firm information, not open to other bidders, from the office of the State

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Engineer and Surveyor, in regard to the estimates of the probable cost of the work included within the contracts, and otherwise to render assistance to said firm in obtaining contracts and favoritism from State officers during the performance of the work, is void as against public policy.	
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9. — <i>Its invalidity may be urged although not pleaded.]</i> The contract being one affecting the interests of the general public, the defense that it is void as against public policy need not be pleaded in order to be available. <i>Id.</i>	
10. — <i>Receipt of benefits thereunder.]</i> The receipt of the benefits of the contract by the contracting firm will not preclude it from asserting, in an action brought to enforce the contract, that it is void as against public policy. <i>Id.</i>	
11. — <i>Test of invalidity.]</i> In order to render a contract void as against public policy, it should appear that the agreement itself contemplates illegal acts or acts condemned as against good morals or public policy. It is not sufficient that acts are done which might be condemned; the test is the intention of the parties. <i>Id.</i>	
12. — <i>What contracts for services before public officers are valid and what are invalid.]</i> Semble, that contracts which provide for the rendition of fair and open services before public officers are valid, but that contracts which contemplate the rendition before public officers of secret services leading to acts of favoritism or unfairness on the part of such public officers are contrary to public policy. <i>Id.</i>	
13. — <i>When time is of the essence of a contract.]</i> The following provision in a contract for the sale of land, "It is hereby understood and agreed that this contract shall be binding and in full force and effect up to and including the 27 of November, 1902, at after which date the same shall terminate and become void and of no effect whatsoever," makes time of the essence of the contract and neither party thereto may insist upon a performance of such contract subsequent to November 27, 1902.	
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14. — <i>An acceptance of the contract is not sufficient.]</i> A letter sent by the contract vendor to the attorney for the contract vendor, stating, "I hereby notify you of my acceptance of the proposition stated in said instrument, namely, to purchase the property known as the Archer Farm, containing ninety seven acres, more or less, for the sum of Thirty-two Thousand Dollars. I would thank you to send me the deed of the property, together with any title papers you may have, so that a contract may be prepared accordingly," does not satisfy the terms of the agreement. <i>Id.</i>	
15. — <i>The time runs from the date not the delivery of the contract.]</i> The general rule is that the time limited by a contract for the performance thereof runs from the date of the contract and not from the delivery thereof, unless, owing to a delay in the delivery, performance within the time limited is thereby rendered impossible or unreasonable. <i>Id.</i>	
16. — <i>An agreement signed with the agent's seal does not bind the principal.]</i> An agreement for the sale of real property executed under his seal by the agent of the owners thereof is not binding upon such owners; the agreement being under seal, the agency cannot be shown with respect thereto. <i>Id.</i>	
17. — <i>A party seeking to rescind a contract must make restitution or allege his willingness to do so.]</i> In every action to rescind a contract, it is, in the absence of fraud, incumbent upon the party seeking to rescind, as a condition precedent to his right to obtain such relief, to restore the benefits received, or to offer to restore such benefits upon the trial; if restoration has not been made prior to the commencement of the action, willingness and ability to restore must be alleged in the pleading and such allegation be compiled with at the trial. CITY OF IRONWOOD v. WICKES.....	164
18. — <i>Action to recover the purchase price of void municipal bonds — purchaser must return all of such bonds.]</i> A firm which purchases municipal bonds of the par value of \$150,000 and pays the obligor city \$25,000 on	

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account of the purchase price, is entitled, if the bonds are void, to rescind the purchase and to recover from the city the \$25,000, provided it is able to restore all of the bonds to the city. *Id.*

19. — *The return of a portion thereof is insufficient.]* Where, however, the firm has sold the bonds to third parties and is unable to obtain, for delivery to the city, more than \$132,000 of such bonds, leaving the remaining \$18,000 of the bonds outstanding in the hands of persons as to whom no adjudication has been made that their bonds are invalid, it is not entitled to recover the \$25,000 or any part thereof. *Id.*

20. — *Parol agreement by a person since deceased to will all his property to another — when it will be enforced.]* A parol agreement alleged to have been made by a decedent in his lifetime, whereby he agreed to will all his property to the other party to the agreement, will not be enforced unless the agreement possesses all the essentials of a contract, is fair and equitable and the terms thereof are definite and certain and are clearly established by the testimony of disinterested witnesses. *PATTAT v. PATTAT* 103

21. — *The agreement is void under the Statute of Frauds — when the rendition of services thereunder will not justify the court in decreeing specific performance.]* Such an agreement is void under the Statute of Frauds, and the rendition of services thereunder is not sufficient to take the case out of the statute and justify the court in decreeing specific performance, when it appears that the value of the services may be estimated and that it would consequently not be inequitable to refuse to decree specific performance. *Id.*

22. — *Failure to plead the statute.]* Where the party with whom the alleged agreement was made sets it up as a valid contract in the answer interposed by him in an action brought to partition the real estate of which the decedent died seized and demands specific performance thereof, the other parties to the action, by neglecting to serve a reply to such answer, are not precluded from asserting that the contract was void under the Statute of Frauds. *Id.*

23. — *Contract — when not so absurd as to be unenforceable.]* What contract between shippers of cattle, by which they agreed to pay commissions one to the other on cattle carried by them, is not so absurd or unreasonable as to be unenforceable, considered. *CEBALLOS v. MUNSON STREAMSHIP LINE* .. 598

24. — *Question of novation, when one for the jury.]* What evidence justifies the submission to the jury of the question whether there was a novation, considered. *Id.*

25. — *Violation of the United States statutes against monopolies.]* When such a contract, which contains no provision as to maintaining rates or preventing competition, and does not fix prices nor confine dealings to a combination of persons, does not violate the United States statutes relating to monopolies, considered. *Id.*

— Assignment under seal — presumption of a valid consideration in addition to "natural love and affection" recited as the consideration therein.

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See INSURANCE.

— Transfer of corporate stock to be used for a specified purpose — its use for another purpose justifies a rescission of the transaction — a fiduciary relation is created. *SLAYBACK v. RAYMOND* 396

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— New York city — charge for the use of a wharf for the first twenty-four hours — implied contract.

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— *Law of, relating to bonds.*

See BOND.

— *Covenant not to sue.*

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— *Law of, relating to deeds.*

See DEED.

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- *Of insurance.*
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- *Relating to landlord and tenant.*
See LANDLORD AND TENANT.
- *Law of, relating to a mortgage.*
See MORTGAGE.
- *Of copartnership.*
See PARTNERSHIP.
- *Of sale of personal property.*
See SALE.
- *Of sale of real property.*
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CONTRIBUTORY NEGLIGENCE :
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- *Of real property.*
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CORPORATION — *Reorganization agreement — liability of the committee created thereby for a failure to file the plan of reorganization prior to a mortgage foreclosure sale at which it purchases the property — where no damage is shown by a bondholder who has deposited his bonds thereunder — his failure to withdraw his bonds from deposit after notice of the filing of the plan of reorganization.]* 1. A railway corporation, having made default in the payment of the interest due on bonds secured by a mortgage upon its property, the trustee named in the mortgage instituted a suit for the foreclosure thereof, and a receiver *pendente lite* of the mortgaged property was appointed. April 9, 1895, during the pendency of the foreclosure action, a reorganization agreement was executed by the terms of which a committee was appointed to represent the bondholders.

The agreement provided that the bonds should be deposited with the Manhattan Trust Company, "subject to the order and full control of the committee, to be used for any purposes under this agreement. The deposit of such bonds shall transfer to the committee the full legal and equitable title thereto for all the purposes of this agreement;" that "the committee is hereby expressly authorized and empowered, and it shall be its special duty to prepare and adopt a plan for the reorganization of the affairs of the railway company, with or without foreclosure. When the committee shall have adopted such plan, a copy thereof shall be lodged with the Manhattan Trust Company. Notice shall thereupon be given to the holders of the trust certificates issued hereunder, and such plan shall become binding upon all of the said holders who do not withdraw herefrom (in the manner hereinafter provided), unless the holders of a majority in interest of the said certificates shall, within twenty days after such notice, file with the Manhattan Trust Company their written dissent from the plan;" that "any holder of a trust certificate issued hereunder may, at any time within thirty days after the mailing to him of notice of the filing of a plan of reorganization, as hereinbefore provided, withdraw from this agreement and recover back the bond or bonds deposited by him upon payment of his *pro rata* share of the expenses theretofore incurred by the committee;" that the committee, for the purpose of effecting a reorganization of the affairs of the railroad company, might take such steps as it might deem advisable for the formation of a new corporation and for transferring to the new corporation all the assets of the railway company; that it might "use the deposited bonds for the purpose of paying for any assets or franchises purchased;" that "the committee may supply any defects or omissions

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which it may deem necessary to be supplied to enable it to carry out the general purpose of this agreement. The committee is authorized to construe this agreement and its construction shall be final; " that no member of the committee should be liable for "anything but his own willful misconduct."

The agreement contained no express provision as to the time when the plan of reorganization should be filed by the committee.

July 16, 1895, the chairman of the reorganization committee, in reply to the request of The Industrial and General Trust, a bondholder which had deposited its bonds under the reorganization agreement, informed such bondholder that the property would be sold September 16, 1895, and that no plan of reorganization had then been adopted and that he was unable to predict the probable date upon which a plan would be issued.

September 16, 1895, the reorganization committee bid in the mortgaged property. Thereafter the reorganization committee caused the incorporation of a new railroad company, and procured the mortgaged property to be conveyed to it, part of the purchase price being paid in cash and part by the use of bonds deposited under the reorganization agreement. All of the stock and securities of the new railroad company were issued to the reorganization committee.

In July, 1898, a plan of reorganization was filed and notice thereof was given to all the bondholders as provided in the reorganization agreement. The Industrial and General Trust, the bondholder before referred to, did not, upon receiving notice of the filing of the plan of reorganization, withdraw the bonds deposited by it, as provided in the reorganization agreement.

In an action brought by The Industrial and General Trust against the reorganization committee to recover damages for an alleged breach of the reorganization agreement, based upon the failure of the committee to file the plan of reorganization prior to the sale of the mortgaged property in the foreclosure action, it was

Held, that the complaint was properly dismissed;

That the reorganization agreement contained no provision, either express or implied, that the plan of reorganization should be filed prior to the sale in foreclosure;

That, assuming that the failure of the committee to file the plan of reorganization prior to the sale did constitute a breach of the reorganization agreement, the plaintiff could not recover damages in this action, as the committee having acquired all of the mortgaged property, it did not appear that the plaintiff's proportionate share of the securities of the new company was not as valuable as the bonds which it had deposited with the reorganization committee, and that, consequently, the plaintiff had not shown that it had sustained any damages from the alleged breach;

That the complaint was also properly dismissed, because the plaintiff, by failing, upon receiving notice of the filing of the plan of reorganization, to withdraw its bonds in the manner provided in the reorganization agreement, had assented to such plan. **INDUSTRIAL & GENERAL TRUST (LTD.) v. TODD.** 263

2. — *When a corporation is not doing business in the State of New York.]* A foreign corporation engaged in the business of selling coal and of shipping it to buyers had its office in the city of Philadelphia, but maintained what was called a branch office in the city of New York for the convenience of its agent in that city. This agent had no authority to make contracts for the sale of coal, but reported everything to Philadelphia. With the exception of a single cargo none of the coal offered for sale by this agent was within the State of New York at the time of the sale, and almost all of the sales made by him were to parties outside of the State of New York. The corporation had no books of account in the State of New York, nor did it have a bank account in that State or keep coal or other merchandise therein.

Held, that the corporation was not doing business in the State of New York within the meaning of section 15 of the General Corporation Law (Laws of 1892, chap. 687), as amended by chapter 588 of the Laws of 1901, prohibiting foreign corporations from doing business in the State of New York without procuring a certificate of authority from the Secretary of State. **PENN COLLIERIES CO. v. MCKEEVER**..... 808

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3. — <i>Action by a stockholder thereof to compel persons to account for property of the corporation which they had converted — a director of the corporation, who took no part in the conversion, is not a proper party.]</i> Where a stockholder of a corporation brings an action in the right of the corporation, the directors thereof having refused to bring it, to compel certain of the individual defendants to account to the corporation, which is also made a party defendant, for property belonging to the corporation which they have converted to their own use, a director of the corporation, who was not one of the persons guilty of the conversion and who had no connection with the corporation until long after the consummation of the conversion, is not a proper party to the action and the complaint is demurable as against him. <i>MULHERAN v. GEBHARDT</i>	98
4. — <i>Directors are not necessary parties.]</i> Directors of a corporation, as such, are not necessary parties to such an action. <i>Id.</i>	
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— Money given to the secretary of an investment company for a mortgage — liability of the company where the mortgage proves to be a forgery — the fact that the secretary has acted as attorney for the lender in other matters does not relieve the company — plea of <i>ultra vires</i> by the company — company not discharged because the mortgage was given by a third person.	
<i>RING v. LONG ISLAND REAL ESTATE EXCHANGE</i>	442
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— Joinder of causes of action — a cause of action under section 81 of the Stock Corporation Law and one at common law for a false report by the treasurer of a corporation may be joined. <i>HUTCHINSON v. YOUNG</i>	407
<i>See MISJOINDER.</i>	
— <i>To carry on insurance business.</i>	
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<i>See RAILROAD.</i>	
COSTS — <i>Stay, because of the non-payment of costs — a copy of the order imposing the costs must be first served.]</i> 1. The stay of proceedings prescribed by section 779 of the Code of Civil Procedure, in the event of a failure to pay the costs directed to be paid by an order, does not operate until after a copy of the order has been served upon the party required to pay the costs, whether or not the time for the payment of such costs is specified in the order. <i>SIRE v. SHUBERT</i>	324
2. — <i>Costs on the dismissal of an appeal to the Court of Appeals.]</i> Where the Court of Appeals dismisses an appeal, "with costs and ten dollars costs of motion," upon a preliminary motion to dismiss the appeal, and not after the argument thereof or upon motion embodied in the argument, the respondent is not entitled to tax an argument fee in the Court of Appeals. <i>MATTER OF WRAY DRUG CO.</i>	456
3. — <i>Settlement depriving the defendant's attorney of his costs.]</i> The right of the parties to an action to settle the litigation does not require the court to carry into effect a settlement made for the purpose of depriving the defendant's attorney of his costs. <i>MATTER OF ROGERS v. MARCUS</i>	552
4. — <i>Administrator not chargeable with costs.]</i> Where, in an action brought against an administrator to determine the title to a policy of life insurance, it does not appear that the defendant was guilty of any fault in laying claim to the policy, the court should not award costs against him personally. <i>VON SCHUCKMANN v. HEINRICH</i>	378

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— Vacating of judgment not granted upon the mere allegation of a party that his attorney acted negligently, unwisely and improperly — terms imposed. <i>EARLY v. BARD</i>	478
<i>See JUDGMENT.</i>	
— When costs are properly charged against executors in their individual capacity. <i>ROONEY v. BODKIN</i>	431
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COUNSEL FEE — <i>Damages on an injunction bond — when a counsel fee is earned in vacating a temporary injunction, not in preventing the granting of an injunction pendente lite.</i>	
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COUNTY — Town bonding — the petition to the supervisors must be in the form required by the statute in existence at the time it is to be acted upon by the supervisors — chapter 469 of the Laws of 1908 is not retrospective.	
<i>WEBSTER v. TOWN OF WHITE PLAINS</i>	398
<i>See Town.</i>	
COURT — Jurisdiction of the Supreme Court of the State of New York of an action against a foreign insurance company brought by a resident of the State of New York as assignee of the party insured under a policy issued by said company, as against a non-resident defendant who has acquired the interest of a mortgagor in the policy.	
<i>See LEWIS v. GUARDIAN ASSURANCE CO. (LTD.)</i>	157
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CREDITOR :	
<i>See DEBTOR AND CREDITOR.</i>	
CRIME — Manslaughter — what indictment sufficiently alleges the causal connection between the death and the act of the accused — when the time of the commission of the crime is sufficiently stated.] 1. An indictment for manslaughter in the second degree charged as follows: "That the said James Murphy did on the day aforesaid wilfully and feloniously break loosen, disengage, or other-	

CRIME — Continued.

wise wilfully and feloniously interfere with the rigging, mechanism and physical apparatus, whereby a certain live electric arc-light and the current-charged wires thereto attached, situated on the Richmond Turnpike in said County and near Linoleumville, could be lowered from their usual safe positions to points unsafe and dangerous; and that the said James Murphy by such breaking, loosening, disengaging or interfering did so cause the said current-charged wires and live electric arc-light to become lowered from their usual safe positions; and that subsequently one August Klein did come in contact with said live arc-light or wires so lowered, and that he was then and thereby killed. The said act having been committed by the said James Murphy without a design to effect death, but by his act, procurement or culpable negligence."

Held, that the allegation that Klein "was then and thereby killed" might be construed as qualifying not only the allegation immediately preceding it, but also the prior allegation that the defendant lowered the light and wires;

That, as thus construed, the indictment sufficiently alleged the causal connection between Klein's death and the lowering of the light and wires;

That the averment that "subsequently one August Klein did come in contact with said live arc-light or wires so lowered" alleged the time when the crime was committed with the certainty required by sections 280 and 284 of the Code of Criminal Procedure;

That such allegation was tantamount to an averment that Klein's death occurred on the same day that the light and wires were lowered.

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2. — *Poolselling — proof sustaining a conviction thereof — instruction to the jury as to the punishment therefor.*] Upon the trial of an indictment, charging the defendant with the crime of poolselling in violation of section 851 of the Penal Code, no evidence was given that the defendant actually engaged in poolselling himself. Testimony was, however, given to the effect that on the day mentioned in the indictment, poolselling was conducted in a building occupied by the defendant as a liquor saloon; that for a period of five minutes defendant was present in the room talking with one Cunningham, while the latter was engaged in hanging up cards bearing the names of the horses entered for each race; that on the day previous to that charged in the indictment, the defendant exercised control over the room by refusing to allow a police officer to enter it, and that a telephone found in the pool room had been placed there upon the application of the defendant.

Held, that the evidence was sufficient to sustain a finding that the defendant assisted and abetted poolselling;

That it was not error for the court to instruct the jury as to the punishment which could be inflicted upon the defendant if he were found guilty.

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— *Offense of selling liquor.*
See INTOXICATING LIQUOR.

DAMAGES — Conspiracy — refusal of railroad companies to handle grain from an independent elevator on the same terms as grain from elevators controlled by an elevator association — the railroad company and the elevator association are liable to the owners of the independent elevator for the damages sustained by them.

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— *Gas company — liability of, where its servant breaks a cellar door in order to remove a meter — express direction by the gas company need not be shown — punitive damages not allowed — what considered in determining the damages — verdict of \$150 not excessive.*

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— *Writ of inquiry issued in an action to recover damages for personal injuries — the court may, in its discretion, direct that it be executed before a judge and a jury drawn from the regular panel.*

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DEED — A deed executed by one of two executors having a power of sale is void.]	
1. Where a will confers on the two executors nominated therein power to sell the testator's real estate, a deed of such real estate executed by but one of the two executors is void if both the executors have qualified and are acting. <i>BROWN v. DOHERTY</i>	190
2. — <i>When a party claiming under such a deed acquires a good title under the Statute of Limitations.]</i> The 5th clause of the will of a testator provided: "I give and bequeath unto my executors to be hereinafter appointed, the rest, residue and remainder of my personal and real estate, in trust, nevertheless, and I do hereby by this my last will and testament, authorize my executors hereinafter appointed to rent, sell or dispose of the rest, residue and remainder of my said real estate, either at public or private sale as they may deem most advantageous to my estate and to execute good and sufficient deed or deeds for the same and to place the residue of the money after paying my just debts as hereinbefore directed arising from such sale or sales, at interest and to pay to my said wife so long as she shall remain my widow, such income arising therefrom for the support and maintenance of my said infant children, during their minority or infancy.	
"And after the said Margaret Dougherty shall cease to be my widow, I give and bequeath to my said children Patrick Dougherty, John Dougherty and James Dougherty, equal, share and share alike, all the estate, both real and personal, that may remain in the hands of the said executors at the time the said Margaret Dougherty shall cease to be my widow.	

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"And I do also authorize and direct my said executors in case of the sale of my real estate, as already provided for, to sign, seal, execute and deliver good and sufficient deed or deeds of conveyance in the law for conveying the said real estate to the purchaser or purchasers thereof."

In 1878 real estate, included within the residuary clause, was sold at a public auction sale pursuant to advertisements published in the names of both of the executors nominated in the will. One of the executors refused to join in the deed to the purchaser, and such purchaser went into possession of the premises under a deed executed by the other executor.

The testator's widow died in January, 1888, and his youngest child became of age December 21, 1889. In 1902 a grantee of the purchaser at the sale brought an action against the testator's surviving children to determine their claim to the property. The plaintiff and her grantor had held the premises adversely since the execution of the deed.

Held, that, assuming that the deed executed to the plaintiff's grantor was insufficient to convey the legal title to the premises, the plaintiff and her grantor had held the premises adversely for a period during which the Statute of Limitations had run against any action which the executors as trustees or the defendants could bring to obtain possession of the premises, and had, therefore, acquired a good title to the premises;

That the Statute of Limitations against an action by the executors as trustees to recover possession of the premises commenced running at the time the deed was executed;

That if, as seemed quite clear, the executors, during the continuance of the trust, held the legal title to the premises and represented the defendants, that period should be counted in determining whether the Statute of Limitations had run;

That even if the executors as trustees were not entitled to the possession of the premises, the defendants, the testator's surviving children, were at liberty to maintain an action of ejectment in their own behalf when possession was taken under the deed. *Id.*

3. — *An estate for life in a beneficiary entitled to the possession, distinguished.]* The case in which an outstanding life estate or estate held for the benefit of another and where the life beneficiary of the trustee is alone entitled to possession, distinguished. *Id.*

— Deed absolute in form executed as security for a debt — agreement by the grantee to reconvey the land within one year on repayment of the debt — execution by the grantor to the grantee of a general release — the grantor cannot subsequently maintain an action to redeem the premises — such a conveyance is not invariably a mortgage — the parties may agree that if the debt is not repaid within the specified time the grantee's title shall become absolute. *LUESENHOP v. EINSELD*..... 68
See VENDOR AND PURCHASER.

— Action to establish that a deed executed by a bankrupt while solvent was in trust for his benefit — there must be a written declaration of the trust — failure of the grantee to allege that there was no written declaration thereof. *HILL v. WARSAWSKI*..... 198
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— Reformation of a quitclaim deed so as to exempt from its operation a covenant restraining the use of the land for saloon purposes — when such relief will be granted. *UIHLEIN v. MATTHEWS*..... 57
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— Ejectment — the plaintiff in ejectment may show that a deed under which the defendants claim title is fraudulent and void, although he did not plead its invalidity. *BABCOCK v. CLARK*..... 119
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— Easement created by grant — not destroyed by non-user — it may be by adverse user. *ANDRUS v. NATIONAL SUGAR REFINING Co.*..... 877
See EASEMENT.

— *Of real property.*

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DEFEASANCE — *In a mortgage.*
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— *When the law of the place of delivery governs.*
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DEMAND — Collateral pledged to secure a note — Statute of Limitations — when it begins to run in such a case in favor of the pledgee — it is not from the date of a demand by the pledgor for the collateral.

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See EVIDENCE.

DEMURRER:

See PLEADING.

DEPOSITION — *Examination of a party before trial — not granted to enable a plaintiff to learn whether he has a cause of action — knowledge of the matter by other witnesses.]* 1. An order for the examination of a defendant before trial will not be granted where the only purpose thereof is to compel the defendant to disclose to the plaintiff whether or not the latter has a cause of action, and the matters in respect to which the plaintiff desires to examine the defendant are within the knowledge of two persons who are not parties to the action, and who, so far as appears, may be called as witnesses upon the trial. KNIGHT v. MORGENTHOTH 424

2. — *Examination of a party before trial.]* An order for the examination of a party before trial will be reversed where the moving papers do not show that such examination is either important or necessary.

RICHARDSON & BOYNTON Co. v. SCHIFF 368

DIRECTOR — *Of a corporation.*

See CORPORATION.

DISCONTINUANCE — *The action of a trial judge in marking a case settled is equivalent to a discontinuance of the action.*

See PRACTICE.

DISHONESTY — *An oral charge of, is not slanderous per se.*

See SLANDER.

DOCK:

See WHARF.

EASEMENT — *Created by grant — not destroyed by non-user — it may be by adverse user.]* Mere non-user will not suffice to destroy an easement in land acquired by grant; a right of way created by grant may, however, be lost by adverse user where the user is exclusive of the interest of the grantee and in open hostility to his claim.

ANDRUS v. NATIONAL SUGAR REFINING Co. 377

EJECTMENT — *Cancellation of notice of lis pendens — when discretionary and when a matter of right.]* 1. Under section 1674 of the Code of Civil Procedure, relating to the cancellation of notices of *lis pendens*, which provides, "after the action is settled, discontinued, or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired, or if a plaintiff filing the notice unreasonably neglects to proceed in the action, the court may, in its discretion, upon the application of any person aggrieved," direct that the notice be canceled, discretion as to the cancellation of the notice is conferred upon the court only where the plaintiff "unreasonably neglects to proceed in the action;" in the other instances enumerated in the section the defendant is entitled, as a matter of right, to have the notice canceled.

JARVIS v. AMERICAN FORCITE POWDER MFG. Co. 234

2. — *What judgment rendered in an action of ejectment is a final judgment.* Where an appeal to the Appellate Division, taken by the plaintiff in

EJECTMENT — *Continued.*

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an action of ejectment from a judgment dismissing his complaint upon the merits, is dismissed for a failure to prosecute it, such judgment is a final judgment within the meaning of section 1674 of the Code of Civil Procedure, and the defendant is entitled, as a matter of right, to have the notice of the pendency of the action canceled.

The fact that, under section 1525 of the Code of Civil Procedure, the plaintiff is entitled, as a matter of right, to have the judgment vacated and a new trial of the action granted upon compliance with certain conditions, does not affect the final character of the judgment. *Id.*

3. — *Definition of final judgment.] Semble, that a final judgment is not simply one which finally determines the rights of the parties with reference to the subject-matter of the litigation, but includes one which finally determines their rights with reference to the particular suit. Id.*

4. — *The plaintiff in ejectment may show that a deed under which the defendant claims title is fraudulent and void although he did not plead its invalidity.] Where the defendant in an action of ejectment produces a deed concededly executed by the person through whom the plaintiff claims title, which deed, upon its face, is properly executed and conveys the premises in dispute, it is competent for the plaintiff to show that the deed is void because it was procured through fraud or undue influence, or because the grantor was mentally incapable at the time the instrument was executed, notwithstanding that he did not allege the invalidity of the conveyance in his complaint or in a reply to the defendant's answer. BABCOCK v. CLARK..... 119*

ELECTRIC WIRE — *Injury from.*

See NEGLIGENCE.

ELEVATOR — *Refusal of railroad companies to handle grain from an independent elevator on the same terms as grain from elevators controlled by an elevator association — it is unlawful.*

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EMINENT DOMAIN — *Rural cemetery association — section 45 of the Membership Corporations Law authorizing it to acquire additional land by condemnation proceedings is constitutional — that the parcel sought to be acquired is separated from the original cemetery by a public highway is not an objection — compliance with the requirements as to maps, surveys and schedules of prices. MATTER OF LYONS CEMETERY ASSN..... 19*

See CEMETERY.

ENTRY — *In a book of a decedent.*

See EVIDENCE.

EQUITY — *Will — equitable cause of action in a life tenant against executors who hold possession of the premises in which the life tenure exists — defense that the plaintiff had an adequate remedy at law — costs charged against executors in their individual capacity.] 1. The will of a testator, by the 8th paragraph thereof, provided: "I also give unto my said niece the house and lot No. 288 Clinton Avenue, Brooklyn, subject to the life estate therein of Margaret F. Bodkin; and the houses and lots Nos. 221 and 223 High Street, in Brooklyn. To have and to hold the said three separate parcels of real estate for and during her natural life, with the fee thereof unto her issue her surviving, but in case of her death without issue surviving, I give and devise said three parcels of real estate unto my brother Martin, or in case he shall have died before the termination of said life estates, unto his heirs, per stirpes."*

The 17th paragraph thereof provided: "I authorize and empower my Executors to take charge of all my real estate, except that directly devised with right of immediate possession to the devisee, and to let, lease, sell and convey the same or any portion thereof. The proceeds derived from the sale of any real estate in which a life interest continues under this will shall be regarded as real estate and be carefully and separately invested by my Executors in order to preserve the interest therein of the life tenant and reversioners. My Executors shall collect the rents and income from all said property and therefrom pay the taxes, repairs and other charges thereon and pay over the net income derived from each portion, or from the investment made in lieu of the real estate to the life tenant entitled thereto."

EQUITY — Continued.

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Subsequent to the probate of the will the testator's niece brought an action against the executors to secure a determination of her rights under the will, alleging that the executors had entered into possession of the High street premises, and that they "have ever since said time collected, and are now collecting, the rents and income thereof, and have and do now claim the right to hold, manage and control the said real estate and to collect the rents issuing therefrom, as testamentary trustees, pursuant to the terms of said last will and testament."

The defendants admitted these allegations, and, upon the trial, the court held that the executors were not entitled to hold the premises against the plaintiff, and that the latter was entitled to an accounting. It also awarded costs against the defendants personally.

Upon an appeal by the executors from so much of the judgment as determined that the Supreme Court sitting as a court of equity had jurisdiction of the action, it was

Held, that the judgment should be affirmed;

That the facts set forth by the plaintiff were sufficient to constitute an equitable cause of action against the defendants and to entitle the plaintiff to the relief granted;

That the defendants could not successfully urge the objection that the court should have refused to take jurisdiction of the action because the plaintiff had an adequate remedy at law, even if that objection were tenable, as they had neglected to plead that defense in their answer;

That a statement in the answer that proceedings are pending in the Surrogate's Court, and that such court has "ample jurisdiction to determine any disputes that have arisen or may arise between the parties concerned in said estate, that these defendants do not invoke the intervention of the equitable powers of this court for a construction of said will, and they deny that the plaintiff is justified in bringing or maintaining this action," was not a sufficient allegation of the existence of an adequate remedy at law;

That in unlawfully refusing to give the plaintiff possession of the property in question the executors acted personally and not in their representative capacity, and were, therefore, properly charged with costs individually.

ROONEY v. BODKIN..... 431

2. — *Reformation of a quitclaim deed so as to exempt from its operation a covenant restraining the use of the land for saloon purposes — when such relief will be granted.*] An agreement was made between Michael J. McManus and Margaret Matthews, who were the owners of adjoining lots, by which McManus granted to Mrs. Matthews a strip of land three and one-half inches wide upon his easterly line and the right to use the easterly wall of the building upon his lot as her westerly wall. Mrs. Matthews granted to McManus for a limited period a right of way over her premises, and also covenanted and agreed that she would "not use or allow her said building (then to be erected) to be used or occupied for a period of five years from the date of this (said) instrument, as a place for the sale of ale, beers, wines or liquors."

Subsequently, when Mrs. Matthews attempted to obtain a loan upon her premises, it appeared that there was some question as to her title to a strip of land adjacent to the lot owned by McManus, and that McManus might possibly make a claim thereto.

Thereafter McManus, upon the application of Mrs. Matthews, executed a quitclaim deed of the premises adjoining his lot. The deed excepted from its operation the right of way heretofore mentioned, but did not except from its operation the covenant restraining Mrs. Matthews from using her land for saloon purposes. The Court of Appeals having decided that the legal effect of the quitclaim deed was to cancel this restrictive covenant, McManus brought an action to have the quitclaim deed reformed so as to except the restrictive covenant from its operation.

The quitclaim deed was executed for the sole purpose of curing the defect of title above mentioned, and the restrictive covenant was not considered by the parties. At the time of the execution of the quitclaim deed a saloon business was being conducted on the lot owned by McManus.

Held, that McManus was entitled to have the deed reformed, under the rule that where parties through ignorance, inadvertence or lack of apprecia-

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tion of their acts have made a contract different from what was intended, equity will give relief by so changing the instrument that as written it will conform to the agreement as made. *UIHLEIN v. MATTHEWS*..... 57

8. — *Transfer of corporate stock to be used for a specified purpose — its use for another purpose justifies a rescission of the transaction — a fiduciary relation is created — equitable relief — Statute of Limitations applicable — it runs from the discovery of the fraud — diligence to discover the fraud.]* John D. Slayback, who was a creditor and stockholder of a corporation, delivered his stock in the corporation to the president thereof upon the latter's agreement to transfer such stock to a third party for the purpose of inducing such third party to come to the rescue of the corporation by sustaining its credit.

The president of the corporation did not deliver the stock to such third party, but diverted it to his own use. Notwithstanding such diversion of the stock, the credit of the corporation was maintained.

Held, that a fiduciary relation existed between Slayback and the president of the corporation, entitling Slayback to an accounting for the stock;

That Slayback was also entitled to rescind the transaction and secure a return of the stock so far as such stock remained under the control of the president of the corporation, or of persons who were not *bona fide* holders thereof;

That he was, therefore, entitled to invoke the equitable jurisdiction of the court, and was not limited to his remedy at law;

That an action at law would not afford him an adequate remedy, as he could not obtain therein a return of the stock;

That the six years' Statute of Limitations applied to an action in equity brought by Slayback to secure relief, and that under subdivision 5 of section 882 of the Code of Civil Procedure the Statute of Limitations did not begin to run until Slayback had discovered, or should have discovered, the fraud perpetrated upon him;

That Slayback did not owe to the president of the corporation the duty of exercising active diligence to discover the fraud, or of taking prompt steps to rescind the contract. *SLAYBACK v. RAYMOND*..... 826

4. — *Equity retains jurisdiction and may grant a money judgment.]* The fact that a rescission may not be practicable upon the rendition of a judgment does not oust a court of its equitable jurisdiction; having once acquired jurisdiction, it may retain it and award a money judgment where there would otherwise be a failure of justice. *Id.*

EVICTION — *Of a tenant.*

See LANDLORD AND TENANT.

EVIDENCE — *Declarations of an agent made after the event — statement by the driver of a wagon that he had smashed the wagon of another is not competent evidence thereof in an action by such other party.]* 1. In an action brought against the Borden's Condensed Milk Company to recover damages for injuries to the plaintiff's buggy, the plaintiff testified that he left his horse and buggy in the street and entered a house and that, upon returning, he found the buggy overturned and injured; that a wagon bearing the sign "Borden's Condensed Milk" was standing near by and that a person, who said he was the driver, told him that his vehicle was a Borden's condensed milk wagon and that he, the driver, had smashed the plaintiff's wagon.

There was no proof, other than the alleged driver's assertion, that he was in fact a driver in the defendant's employ.

Held, that the admission, over the defendant's exception, of the declarations of the alleged driver, constituted reversible error;

That the negligence of a corporation cannot be established by the declarations of its servants made after the event.

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2. — *What is objectionable as calling for matters of opinion or the witness' conclusions or for matter already testified to by the witness.]* In an action brought to recover the value of materials furnished and labor performed by the plaintiff in constructing driven wells for the defendant, the following testimony was given by the plaintiff on his direct examination:

EVIDENCE — Continued.**PAGE.**

"Q. Did they work well? A. Yes, sir; pumped free and all right a good quantity of water." Upon the defendant's redirect examination the following questions propounded to him were excluded: "Q. What has been the value of these wells to you?" "Q. Have you been able to use them at all?" "Q. Have you ever been able to use any water from these wells?" "Q. Have you ever used any water from these wells?"

Held, that the first three questions propounded to the defendant were objectionable, in that they called for matters of opinion or conclusions of the witness and not for statements of fact, and that the fourth question propounded to him was properly ruled out because the defendant had already testified that he had not used any of the water from the wells.

DUBOIS v. WILLIAMSON 361

3. — *A witness, cross-examined as to whether he gave certain testimony on a coroner's inquest, should be permitted to state on his redirect examination whether he gave certain other testimony thereon.]* Where, upon the trial of an action to recover damages resulting from the death of the plaintiff's intestate, caused by the alleged negligence of the defendant, one of the defendant's witnesses, who, previous to the trial, had testified as to the accident on a coroner's inquest, is cross-examined as to whether, at the coroner's inquest, certain questions were not put to him and whether he did not make certain answers thereto, such witness should, upon his redirect examination, be permitted to state whether certain other questions relating to the subject upon which he had been cross-examined had not been put to him at the coroner's inquest, and whether he did not make certain answers thereto.

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4. — *Appeal from an order setting aside a verdict — exception to the admission of incompetent evidence — when not available on a motion to set aside the verdict.]* Where, on a jury trial, the court admits incompetent evidence, over the objection and exception of the plaintiff, but offers to strike out such incompetent testimony or to declare a mistrial, if the plaintiff declines each of such offers and elects to run the risk of obtaining a favorable verdict from the jury, the exception taken by him to the admission of the incompetent evidence is not available to him on a motion to set aside an unfavorable verdict. FOX v. METROPOLITAN STREET R. Co. 229

5. — *The Appellate Division may examine the opinion of the trial judge.] Semble*, that upon an appeal from an order setting aside a verdict, the Appellate Division may examine into the opinion of the trial judge to ascertain the grounds upon which the order was made. *Id.*

6. — *Statement therein that the verdict was set aside as a matter of discretion.]* A statement in the opinion that the verdict was set aside as a matter of discretion can refer only to the weight of evidence. *Id.*

7. — *Payment of a note — entries in the cash book and ledger of the maker are incompetent to establish it.]* In an action in which the plaintiff claimed that a certain note made by a firm, of which her testator was a member, to the order of the defendant's testator, was a renewal note and had been paid, the plaintiff is not entitled, for the purpose of supporting her contention, to introduce in evidence entries taken from the cash book and ledger of the firm, of which her testator was a member, relating to transactions with the defendant's testator.

Sembla, that the rule authorizing the admission in evidence of books of account in favor of the person keeping such books has no application to the case of books or entries relating to cash items or dealings between the parties. BROWN v. BRONSON. 312

8. — *Proof of facts, arising after the bringing of the action, alleged in the pleading.]* The rule that, in an action at law, the rights of the parties must be determined as of the time when the action was commenced, is subject to exceptions, one of which is that where a fact has arisen subsequent to the joinder of issue, which either increases, diminishes or extinguishes the right of recovery, such fact may be proved if the same is set out by appropriate allegations in a supplemental complaint or answer.

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9. — <i>Reversal on questions of fact, when justified.</i>] Before a judgment can be reversed as against the weight of evidence it must appear that the proof offered clearly preponderates in favor of a result contrary to that which has been reached. Mere difference of opinion respecting the conclusion which should have been reached is not sufficient to justify the reversal of a judgment as being against the weight of evidence. <i>SLAYBACK v. RAYMOND.</i> 826
10. — <i>Evidence that the owner intended the fixtures to become a part of the realty.</i>] The actual annexation of fixtures to the realty with the purpose of using them in connection with such realty, furnishes, in the absence of proof to the contrary, evidence that the owners intended to make the fixtures a permanent accession to the real property. <i>JERMYN v. HUNTER.</i> 175
11. — <i>Construction of words ejusdem generis.</i>] A covenant in respect to a lessee's duty to make repairs must be construed upon the principle that where words of general description are associated with words of particular description the general words, in the absence of anything clearly manifesting a contrary intent, shall be limited so as to be <i>eiusdem generis</i> with the particular words. <i>DUCKER v. DEL GENOVESE.</i> 575
12. — <i>Construction of the language of a promise.</i>] If the language of a promise may be understood in more senses than one, it is to be interpreted in the sense in which the promisor had reason to believe that it was understood. <i>Id.</i>
13. — <i>Offer of firm books in evidence.</i>] Where the existence of a debt due from a firm and the amount thereof have been established by the firm ledger and by a contract, the court may properly decline to permit the firm to offer in evidence all of the firm books. <i>FLAGG v. FISK.</i> 169
14. — <i>Objection after testimony has been admitted — motion to strike out.</i>] Where incompetent testimony is admitted, and objection and exception are not taken until subsequent to the admission of the testimony, no legal error is presented. The remedy in such case is by motion to strike it out. <i>BUCKLEY v. WESTCHESTER LIGHTING CO.</i> 436
15. — <i>Status of excise agents as witnesses.</i>] Excise agents are not to be ranged in the same category of witnesses as persons hired to procure evidence, or even as detectives. <i>CULLINAN v. RORPHURO.</i> 200
16. — <i>Question of novation, when one for the jury.</i>] What evidence justifies the submission to the jury of the question whether there was a novation, considered. <i>CEBALLOS v. MUNSON STEAMSHIP LINE.</i> 593
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— Ejectment — the plaintiff in ejectment may show that a deed under which the defendant claims title is fraudulent and void although he did not plead its invalidity. <i>BABCOCK v. CLARK.</i> 119 <i>See EJECTMENT.</i>
— Injury to a horse while in the possession of a bailee for hire — the bailee must show that it was not the result of negligence on his part. <i>SNELL v. CORNWELL.</i> 186 <i>See BAILMENT.</i>

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EXECUTOR AND ADMINISTRATOR — Will directing the executors thereof to pay a mortgage upon property in which the testator's son has a life estate — purchase of the property by the executors upon a foreclosure of the mortgage — when they acquired a good title as against judgment creditors of the son who were parties to the foreclosure action.]	
1. March 19, 1895, Mary A. Flanagan executed her will, by which she directed her executors to sell a parcel of land known as the Mott avenue property and invest the proceeds of such sale and to pay the net income of all her property and of all bonds, mortgages and other investments to her son, William C. Flanagan, during his life.	
The will further provided: "Twentieth, I empower my said executors to pay off any mortgage on my real estate at Avenue B and Fourteenth Street with any funds which they may have in their hands from the sale of any other portion of my estate, and for said purpose to sell or dispose of for cash any other property in their hands."	
November 10, 1896, the said Mary A. Flanagan conveyed to her son, William C. Flanagan, a life estate in the property on the corner of Fourteenth street and Avenue B, subject to the following conditions: "First, that the said party of the second part shall have the power to receive the rents, issues and profits of said premises during the term of his natural life. Second, that said party of the second part shall, during the term of his natural life, make and do any and all repairs upon said premises in good and sanitary condition, pay all taxes, croton water rents and assessments which may be laid or levied upon said premises, and shall comply with any and all ordinances of the City of New York and perform any and all directions or orders of the Board of Health, Fire, or other departments of said City which shall be empowered by law to make the same. Third, should said party of the second part die leaving him surviving issue, or issue of a deceased child or children, then said premises shall be and become the property in fee of said issue <i>per stirpes</i> and not <i>per capita</i> . Fourth, should said party of the second part die intestate and leave a widow him surviving, but no issue or issue of a deceased child or children, then said widow shall be entitled to one-third	

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part of said property. *Fifth*, should said party of the second part die intestate, leaving him surviving no widow or issue or issue of a deceased child or children, then said premises are to revert to and belong and be disposed of as part of the estate of the party of the first part and to be distributed in accordance with the last will and testament, if any, of the said party of the first part. *Sixth*, said party of the second part shall have no power or authority to sell, mortgage or otherwise encumber, or suffer to be sold, mortgaged or encumbered any part of said premises."

The property conveyed was then subject to the lien of a \$12,000 mortgage.

November 20, 1896, said Mary A. Flanagan executed a codicil to her will, by which she directed her executors to sell the Mott avenue premises as provided in the will. The codicil contained the further provision: " *Fifth.* I hereby direct my executors hereinafter named to pay out of the moneys realized upon the sale of my property on the easterly and westerly sides of Mott Avenue any mortgage upon the premises situate on the southwest corner of Avenue B and 14th Street, whether the same be owned by me at time of my death or shall have been transferred to my said son, but not otherwise."

Mary A. Flanagan died December 15, 1896, seized of the Mott avenue property, and the will and codicil were duly admitted to probate.

April 14, 1897, William C. Flanagan leased the property on the corner of Fourteenth street and Avenue B to one Mullen for a term of ten years. He subsequently formed a partnership with Mullen under an agreement which provided that the lease should become an asset of the partnership. The partnership failed and judgments were obtained against Flanagan and Mullen. In January, 1898, the trustees under the will of Mary C. Flanagan sold the Mott avenue property, receiving therefor more than sufficient to pay the mortgage on the Avenue B property. Thereafter, an attorney, acting in the interest of William C. Flanagan, informed the executors and trustees under the will that Flanagan had no further interest in the property, and that under the will the trustees could not pay off the mortgage thereon.

In consequence of this notice, the trustees did not pay off the mortgage, and an action was commenced to foreclose it. Both Flanagan and his judgment creditors and also the trustees were made parties to the foreclosure action. The executors and trustees purchased the property at the foreclosure sale with funds belonging to the estate. They subsequently sold the property, receiving therefor the sum of \$21,000.

In an action brought by a judgment creditor of William C. Flanagan to have the income of such \$21,000 applied on his judgment, upon the theory that it was the duty of the trustees to pay off the mortgage and thus prevent the foreclosure, it was

Held, that it was not clear whether the direction in the will that the executors pay off the mortgage had become operative;

That, aside from this question, the trustees, by the conveyance from the referee in the foreclosure action, acquired an absolute title to the property, free from any claim on the part of Flanagan or his judgment creditors, who had been made parties to the action;

That, if the trustees were bound to pay the mortgage and thus release the property from the lien thereof, Flanagan and those claiming under or through him should have asked for that relief in the foreclosure action.

See MARSHALL v. UNITED STATES TRUST CO. 252

2. — *Proof required of a claim for rent against a decedent's estate where no demand therefor was made against him.]* A claim presented against a decedent's estate, for rent of premises occupied by the decedent and his maiden sister for a period of five years, should, where the claimant does not contend that he made any claim for such rent during the decedent's lifetime, be carefully scrutinized and admitted only upon very satisfactory proof.

Evidence which is insufficient to warrant the allowance of such claim, considered. *GENET v. WILLOCK* 588

3. — *A claim for funeral expenses is not the subject of a reference under section 2718 of the Code of Civil Procedure.]* A claim for funeral expenses is not regarded as a debt due from the decedent, but rather as a charge against his estate.

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Such a claim cannot, therefore, be made the subject of a reference, pursuant to section 2718 of the Code of Civil Procedure, notwithstanding the consent of the decedent's administratrix to the reference and her omission to raise the objection upon the reference. *Id.*

4. — *Administrator of the assured not chargeable with costs.*] Where in an action brought against an administrator to determine the title to a policy of life insurance, it does not appear that the defendant was guilty of any fault in laying claim to the policy, the court should not award costs against him personally. *VAN SCHUCKMANN v. HEINRICH.* 278

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FALSE REPRESENTATION—*Order of arrest—when the moving papers fail to show personal knowledge by the affiant of the fact that alleged false representations were made by the defendant to a commercial agency.*] In an action to recover damages for alleged false representations, by which the plaintiffs were induced to sell goods to the defendants, an application for an order of arrest was made upon the complaint and an affidavit made by one of the plaintiffs, which alleged that the defendants, for the purpose of inducing the plaintiffs and other merchants throughout the city of New York to sell and deliver to them goods, wares and merchandise upon credit, made a false statement to the commercial agency of R. G. Dun & Co.

The affidavit averred that the false statement read as follows:

"April 10, 1903, at this address, David Levy (one of the defendants) gave our reporter above personal details and dictated the following statement: Financial condition on December 30, 1902, as per inventory (here followed a statement of financial condition). (Signed) D. LEVY & CO."

"April 15, 1903."

FALSE REPRESENTATION — *Continued.*

The affidavit then continued: "That deponent's firm of Fred Butterfield & Co. are subscribers to said mercantile agency and obtained said statement from said agency prior to the sale and delivery to the defendants of the goods hereinafter mentioned."

The plaintiffs did not present the affidavit of any member of the firm of R. G. Dun & Co. or of the reporter to whom the statement was alleged to have been made.

Held, that the moving papers were insufficient to justify the granting of the order of arrest;

That there was nothing to show that the affiant had any personal knowledge that the defendants made or signed the statement attributed to them, or that he ever saw the original statement made to the reporter;

That, on the contrary, it appeared that his knowledge was derived solely from the statement furnished by R. G. Dun & Co., and that the only fair inference to be drawn from all the facts was that the latter statement was not the original statement but a copy thereof;

That it could not be inferred that the statement referred to in the affidavit was in writing and was seen by the affiant, and that the latter knew the signature of the defendants to be correct;

That even if such an inference could be drawn from the papers, it would not be sufficient to justify the granting of the order, as such an order must be based upon facts set out in the affidavit, and from which, if uncontradicted, the court can see that the party proceeded against is guilty of the charge made against him. *PRICE v. LEVY*..... 274

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2. — <i>Statute of Limitations.</i>] The time for the commencement of an action by the infant to avoid the guardian's purchase is governed by section 388 of the Code of Civil Procedure, which provides that an action, the limitation of which is not specially prescribed, must be commenced within ten years after the cause of action accrues, and by section 396 of said Code, which provides that the time limited for the commencement of an action shall not be extended by any disability more than one year after such disability ceases. <i>Id.</i>	

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3. — *She need not wait until she has attained her majority to disaffirm it.]* In such a case the infant cannot effectually ratify the voidable purchase until she attains her majority, but she may, during her infancy, maintain an action to disaffirm the purchase. Consequently, for the purpose of applying the Statute of Limitations, the infant's cause of action will be deemed to accrue at the time the guardian in socage purchased the property and not at the time when the infant attained her majority. *Id.*

4. — *Bona fide purchasers from the guardian in socage are protected—notice to such purchasers.]* The title of a person who purchases the premises from the guardian in socage, for value and without notice of the relations existing between his grantor and the infant, is superior to the infant's claims. *Id.*

5. — *Facts appearing in the judgment roll in the foreclosure action.]* Such a purchaser is chargeable with knowledge of the facts appearing in the judgment roll in the foreclosure action, but recitals in the roll that the owner of the equity of redemption was an infant, and that her father and mother had died intestate, and that at the time the foreclosure action was pending she was living with her paternal uncle, who purchased at the foreclosure sale, and that she had no general or other guardian, do not impose upon the purchaser the duty of making inquiries to ascertain whether the purchaser at the foreclosure sale was the oldest and nearest relative of the infant, and, therefore, her guardian in socage by operation of law. *Id.*

6. — *Purchaser's duty as to the examination of title.]* An intending purchaser of real estate will be presumed to have investigated the title; to have examined every deed or instrument forming a part of it, especially if recorded, and to have known every fact disclosed or to which an inquiry suggested by the record would have led. The duty incumbent upon him in this respect is to exercise the reasonable care and diligence of a good and faithful expert in the business of examining titles. *Id.*

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2. — *An execution cannot be issued nor proceedings supplementary thereto be maintained against the husband.]* Such an order is not an order directing the payment of a "sum of money" within the meaning of section 779 of the Code of Civil Procedure which provides that an execution may issue to enforce such an order.

The issue of an execution against the husband to enforce the order is, therefore, unauthorized, and the return of the execution unsatisfied does not entitle the wife to institute supplementary proceedings against her husband under section 2485 of the Code of Civil Procedure. *Id.*

3. — *Payment by a husband of his wife's funeral expenses—reimbursement from her estate.]* A husband who pays his wife's funeral expenses is

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entitled to reimbursement from the wife's estate for the reasonable expenses so incurred. <i>PACHE v. OPPENHEIM</i>	221
4. — <i>He may bring the action therefor in the New York Municipal Court.</i> Assuming that the liability of the wife's estate to the husband is based upon a <i>quasi</i> contract, an action to enforce such liability is an action to recover damages upon contract within the meaning of subdivision 1 of section 1 of the New York Municipal Court Act (Laws of 1902, chap. 580), which confers on such court jurisdiction of "an action to recover damages upon or for breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed five hundred dollars." <i>Id.</i>	
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<i>See PERLMAN v. BERNSTEIN</i>	335
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INSURANCE — <i>Assignment under seal of a life insurance policy — presumption of a valid consideration in addition to "natural love and affection" recited as the consideration therein — administrator of the assured not chargeable with costs — allowance of a premium paid by him.</i>] 1. In an action brought by Frieda Von Schuckmann against the administrator of Herman O. Heinrich to determine which of the parties was entitled to the proceeds of a policy of insurance upon the life of the said Herman O. Heinrich, it appeared that the policy was issued April 7, 1900, and was made payable to Heinrich's executors or administrators; that on August 14, 1900, Heinrich executed and delivered to the plaintiff an instrument sealed and acknowledged by him assigning the proceeds of said policy to her; that the assignment contained the following recital: "in consideration of natural love and affection, I hereby assign and transfer unto Frieda Von Schuckmann * * * my intended wife."	
Prior to the issuing of the policy Heinrich had been paying his addresses to the plaintiff and she had promised to marry him if she could bring herself to think that she could bestow upon Heinrich the love and affection she thought should accompany a promise to marry.	
After the assignment was made she notified Heinrich that she had decided not to marry him. Heinrich accepted the determination as final, but evi-	

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dently continued to regard her with affection. He made no demand upon her for the return of the assignment of the policy of insurance, and it did not appear that he ever expected or desired a return of the same.

Held, that as the assignment of the policy of insurance was under seal, and was acknowledged, a presumption arose that it was based upon a valid consideration;

That the burden was upon the defendant to overthrow this presumption by proof, and that as he did not produce such proof or show that the plaintiff did not give an adequate consideration for the assignment quite independent of love and affection, or of mutual respect, the latter was entitled to receive the proceeds of the policy;

That as it did not appear that the defendant was guilty of any fault in laying claim to the proceeds of the policy of insurance, the court should not have awarded costs against him personally;

That the administrator should also be allowed a premium which fell due before, and was paid by him after, the death of the assured.

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2. — *Accidental injury—dizziness and inability to continue work because of the hardening of the blood vessels of a certificate holder in a mutual benefit association.]* Upon the trial of an action brought by the plaintiff, as a member of the defendant, a mutual benefit association, to recover a disability benefit which the constitution of the defendant provided that he should receive if he became permanently disabled for life by accidental injuries while working at his occupation as a carpenter, the plaintiff testified that he was building a porch over a stoop; that "I was putting up the frame and the rafters to it and I had to climb up a ladder; I didn't have any scaffolding built, and I was taken very dizzy, and came nigh falling off the ladder, and I got down and stayed down quite a while, and made three or four attempts to get as far I could, and I couldn't make out with it. Then I went and got another man to help finish it. I did not fall off that ladder. I came very near to it. It was not a warm day."

His theory was that, on the occasion referred to, he was suffering from a hardening of the blood vessels of the body, known in medicine as arterial sclerosis, and that the strain to which he was subjected in lifting heavy timber ruptured a diseased blood vessel and produced a condition unfitting him for further labor at his trade.

Held, that the plaintiff had not established the existence of an accidental injury within the meaning of the defendant's constitution.

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3. — *Fire insurance policy containing a mortgagee clause—the mortgagee's right to recover is dependent upon that of the insured.]* Where a policy of fire insurance is made payable to a mortgagee of the insured property, as his interest may appear, if the policy is void as to the insured, it cannot be enforced by the mortgagee. LEWIS v. GUARDIAN ASSURANCE Co. (LTD.).... 187

4. — *The mortgagee is a necessary party to an action brought by the insured upon the policy.]* The mortgagee is a necessary party to an action brought by the insured to recover upon the policy. He may join with the insured in bringing the action, and, if he refuses to do so, the insured may make him a party defendant. *Id.*

5. — *Jurisdiction, where the mortgagee is a non-resident.]* Where a foreign insurance corporation authorized to do business in the State of New York issues, at its office in Montreal, Canada, a policy of fire insurance to a New York corporation upon property located in Canada, containing a provision that the loss, if any, shall be payable to "John G. Foster, Esq., agent for mortgagee, as his interest may appear," and, subsequent to the destruction of the property by fire, the insured corporation assigns its claim to a resident of the State of New York, and the latter brings an action in the Supreme Court of the State of New York to recover upon the policy, making a resident of Canada, who had acquired the interest of the mortgagee referred to in the policy, a party defendant, he having refused to

INSURANCE — <i>Continued.</i>	PAGE.
become a party plaintiff, the court has jurisdiction to entertain the cause of action as to such non resident defendant. <i>Id.</i>	
6. — <i>An agent of the insurance company may waive a prohibition as to other insurance.]</i> Knowledge on the part of an agent of a fire insurance company, at the time he issues a policy of fire insurance, that there is other insurance on the property, is attributable to his principal and constitutes a waiver of a provision in the policy that it should be void if, at the time it was issued, the insured had, or thereafter procured, other insurance upon the property. <i>Id.</i>	
7. — <i>The continuation of existing insurance does not constitute "other insurance."]</i> In such a case the fact that, previous to the happening of a loss under the policy, the insurance existing upon the property at the time of the issuance of the policy has been continued by means of renewals of the existing policies, or by substituting others therefor, does not constitute a breach of the condition as to "other insurance." <i>Id.</i>	
8. — <i>When the question of agency is one of fact.]</i> In an action upon a policy of fire insurance, in which the issue litigated was whether the firm of Paterson & Son, who delivered the policy to the insured, were the agents of the defendant insurance company, it appeared that the policy sued upon contained the words, "Agency Montreal, Paterson & Son," and that indorsed upon it were the words, "Paterson & Son, agent, Montreal Agency," and that these were written in and upon the policy by the defendant insurance company; that when the application for the policy was made an interim receipt was issued containing the words, "Paterson and Son, Agency."	
A witness for the plaintiff testified that he had known Paterson & Son twelve or thirteen years, during which time they had been managers of the defendant insurance company. A member of the firm of Paterson & Son testified, on behalf of the defendant insurance company, that at the time the policy was issued he was not the agent of the defendant insurance company and had never issued any policies for it. The manager of the defendant insurance company also testified that neither the firm of Paterson & Son nor any member of it was the agent of the defendant insurance company.	
<i>Held,</i> that it was error for the court to determine, as a matter of law, that the firm of Paterson & Son were not the agents of the defendant; that the question was one of fact for the jury to determine. <i>Id.</i>	
9. — <i>Breach of a warranty that the beneficiary was the insured's wife.]</i> A warranty contained in a policy of accident insurance that the beneficiary therein is the wife of the insured, will, if false, render the policy void.	
<i>GAINES v. FIDELITY & CASUALTY Co.</i> 524	524
— Action by the holder of a certificate issued by an insurance association, on behalf of herself and parties similarly situated, to establish her claim, to compel the directors of the association to account for moneys which they had misappropriated, and to procure the removal of the receiver of the association and the appointment of a new receiver — when the complaint states but one cause of action. <i>POWELL v. HINKLEY</i> 138	138
<i>See MISJOINDER.</i>	
— Delivery of a life insurance certificate in accordance with an oral agreement, not disturbed, although the oral agreement be illegal.	
<i>HAMBLEN v. GERMAN</i> 464	464
<i>See CONTRACT.</i>	
— Contract to furnish fire insurance at certain rates — what constitutes a rescission thereof by mutual consent — consideration therefor.	
<i>TANENBAUM v. JOSEPH</i> 341	341
<i>See CONTRACT.</i>	
— Railroad company — liability for a passenger's trunk stolen while in its possession — it is an insurer.	
<i>WILLIAMS v. CENTRAL RAILROAD CO. OF N. J.</i> 588	588
<i>See RAILROAD.</i>	
INTEREST:	
<i>See PRINCIPAL AND INTEREST.</i>	

INTOXICATING LIQUOR—*Revocation of liquor tax certificate—if the certificate holder defaults on the return of the order to show cause, the court may order a referee to take proof and report.]* 1. Subdivision 2 of section 28 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1903, chap. 486) provides that, upon the presentation of a petition for the revocation of a liquor tax certificate, the court shall make an order requiring the holder of the liquor tax certificate to show cause why the certificate should not be revoked, and that on the return day of the order to show cause, “the justice, judge or court before whom the same is returnable shall grant such order revoking and cancelling the said liquor tax certificate, unless the holder of said liquor tax certificate shall present and file an answer to said petition, which answer denies each and every violation of the Liquor Tax Law alleged in the petition, and raises an issue as to any of the facts material to the granting of such order, in which event the said justice, judge or court shall hear the proofs of the parties and may, if deemed necessary or proper, take testimony in relation to the allegations of the petition or answer, or appoint a referee to take proofs in relation thereto, and report the evidence to such justice, judge or court, without opinion.”

Held, that instead of revoking the certificate, the court, in the event of the failure of the certificate holder to appear on the return of the order to show cause, might appoint a referee to take proof in relation to the allegations in the petition and to report the evidence to the court without opinion, particularly as the court has power, both inherent and statutory (Code Civ. Proc. § 1015), to order references on motions and special proceedings when it deems them necessary, and has been accustomed to exercise this power for many years;

That an enactment of the Legislature will not be construed as modifying time-honored customs and powers of the court, in the absence of an express provision to that effect therein.

MATTER OF CULLINAN (WATSON CERTIFICATE)..... 540

2. —*Bond given by a pharmacist to obtain a liquor tax certificate—sale by the pharmacist's clerk of liquor without a physician's prescription in violation of his master's instructions—it will sustain an action on the bond.]* Where a pharmacist obtains a liquor tax certificate upon executing a bond conditioned that he will not “suffer or permit any gambling to be done in the place designated by the liquor tax certificate in which the traffic in liquor is to be carried on, or in any yard, booth, garden or any other place appertaining thereto or connected therewith, or suffer or permit such premises to become disorderly,” and will “not violate any of the provisions of the Liquor Tax Law,” and while he is necessarily absent from his store, a clerk in his employ, in violation of his instructions and in violation of the Liquor Tax Law, sells liquor without requiring the vendee to produce a physician's prescription, the pharmacist and his surety are liable for the penalty prescribed in the bond.

The language of the condition of the bond will not support the inference that it was intended that the pharmacist be held liable only for those violations of the Liquor Tax Law which he himself has committed.

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3. —*Such an action is one on contract, not one to recover a penalty.]* An action upon a bond given in order to procure a liquor tax certificate is one upon a contract obligation, and not one to recover a penalty or forfeiture imposed by statute. *Id.*

4. —*Liquor tax certificate—use on Sundays of a pavilion used in connection with a bar on week days but separated from the bar on Sundays by a partition.]* The entrance to a hotel was through a pavilion fitted with folding doors, which were thrown open during business hours. The pavilion was fitted up with tables, and in one corner thereof was a bar. On Sundays the bar was partitioned off from the pavilion by a wood and glass partition, so that, while the bar was fully exposed, it was, in fact, entirely cut off from the pavilion except that a doorway was provided for the use of the proprietor's servants.

Held, that the entire pavilion did not constitute a barroom;

That, consequently, the opening of such pavilion on Sunday did not constitute a violation of clause g of section 81 of the Liquor Tax Law, which

INTOXICATING LIQUOR—Continued.	PAGE.
prohibits the holder of a liquor tax certificate from having open or unlocked during the hours when the sale of liquor is forbidden any door or entrance to the room or rooms where liquors are sold.	
MATTER OF CULLINAN (YOUNG CERTIFICATE).....	437
5. — <i>What does constitute a meal.]</i> The proprietor of a hotel is not obliged to inquire diligently into the motives which actuate those who frequent his premises.	
He has a right, in the absence of knowledge to the contrary, to assume that one who comes into his place and orders a sandwich or any other article of food does so because he desires the nourishment which it affords, and if a single sandwich satisfies the desire of such person, it constitutes a meal, and the proprietor of the hotel has the right to serve liquors to such person with such meal under section 81 of the Liquor Tax Law (Laws of 1896, chap. 112, as amd. by Laws of 1897, chap. 912). <i>Id.</i>	
6. — <i>What does not constitute a meal—the primary intent of the party controls.]</i> Where, however, persons, who come into the hotel on Sunday, order whisky primarily, and, upon being told that they cannot be served unless they order something to eat, inform the waiter, in the hearing of the bartender and others, that they do not want anything to eat, but order two sandwiches, saying, at the time, that they were not obliged to eat them, and they do not in fact eat them, the sandwiches so served do not constitute a meal nor do the persons ordering them become guests, and the sale of whisky to them is unlawful. <i>Id.</i>	
7. — <i>Action upon a bond given to procure a liquor tax certificate—a verdict in favor of the defendants will be set aside where it is opposed to the uncontradicted testimony of excise agents.]</i> Where, on the trial of an action brought by the State Commissioner of Excise to recover the penalty of a bond given in connection with a liquor tax certificate, two excise agents in the employ of the excise department testify positively that the holder of the liquor tax certificate sold liquor to them at prohibited times, and such testimony is unimpeached and in reality uncontradicted, a verdict rendered in favor of the defendants should be set aside as against the weight of evidence.	
CULLINAN v. RORPHURO.....	200
8. — <i>Status of such agents as witnesses.]</i> Excise agents are not to be ranged in the same category of witnesses as persons hired to procure evidence, or even as detectives. <i>Id.</i>	
INVENTION : <i>See PATENT.</i>	
JOINDEE — Of causes of action. <i>See MISJOINDEE.</i>	
JUDGE'S CHARGE — In negligence cases. <i>See NEGLIGENCE.</i>	
JUDGMENT — Vacatio[n] of judgment not granted upon the mere allegation of a party that his attorney acted negligently, unwise and improperly.] 1. A judgment rendered against the defendant in an action after a trial thereof at which he and his attorney were present, but at which no evidence was offered in his behalf, will not be vacated upon the mere allegation of the defendant, unsupported by proof, that the action of his attorney in failing to introduce evidence in defense was negligent, unwise and improper.	
EARLY v. BARD.....	476
2. — <i>Terms imposed.]</i> In any event such relief should only be granted upon condition that the defendant pay the costs of the action and of the motion. <i>Id.</i>	
— Will directing the executors thereof to pay a mortgage upon property in which the testator's son has a life estate — purchase of the property by the executors upon a foreclosure of the mortgage — when they acquired a good title as against judgment creditors of the son who were parties to the foreclosure action. MARSHALL v. UNITED STATES TRUST CO.....	263
<i>See EXECUTOR AND ADMINISTRATOR.</i>	

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- Testamentary trustee — a decree on an intermediate accounting is final on the question whether a dividend should be credited to income or principal — refusal of the trustee to bring suit to correct an error in such credit. **MATTER OF ELTING**..... 516
See SURROGATE.

- What judgment rendered in an action of ejectment is a final judgment — definition of final judgment.
JARVIS v. AMERICAN FORCITE POWDER MFG. CO...... 234
See EJECTMENT.

- JUDICIAL SALE** — Motion by a purchaser to be relieved from a purchase at a mortgage foreclosure sale — what deed is not an exercise of a power of sale — a deed and declarations made by a widow and children, insufficient where there are contingent remainders. **HUBER v. CASE**..... 479
See MORTGAGE.

- JURY** — Demand for a jury trial in the New York Municipal Court.
See MUNICIPAL CORPORATION.

- LANDLORD AND TENANT** — *A landlord cannot recover rent where a third person rightfully retains possession of a part of the demised premises.]* 1. In an action brought by a lessor against a lessee to recover a balance of rent alleged to be due for the month of May, 1902, it appeared that the plaintiff leased the premises to the defendant for one year from May 1, 1902, at the yearly rental of \$900 payable monthly in advance and that the defendant paid \$25 on account of the rent due May first.

When the first day of May arrived, the plaintiff instituted legal proceedings to dispossess one Tobin, a tenant who occupied the ground floor of the premises in question, but it was judicially determined therein that Tobin was still entitled to possession.

The defendant occupied the balance of the premises during the month of May, the plaintiff having requested him to remain during that month and having promised to oust Tobin at the end thereof. On June first the defendant vacated the premises owing to the fact that it appeared that Tobin would remain in possession thereof indefinitely. Tobin remained in possession for many months thereafter and the plaintiff demanded and received rent from him upon his own responsibility and not as agent for the defendant.

Hold, that the plaintiff was properly nonsuited.

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2. — *Clause in a lease making the tenant liable in case he vacates the premises for any deficiency arising on the reletting of the property, construed.]* A lease for one year from October 1, 1902, provided that the rent should be paid monthly in advance on the first day of each month during the term. It also provided "That in case of default in any of the Covenants, the landlord may resume possession of the premises, and relet the same for the remainder of the term, at the best rent that can obtain for account of the Tenant, who shall make good any deficiency."

The tenant moved out of the premises on July 1, 1903, without paying the rent due on that day. On September 1, 1903, the landlord relet the premises.

Hold, that as the rent payable July 1, 1903, had become due before the landlord re-entered, the landlord's right to recover such rent was not affected by the re-entry clause.

Sembie, that as the re-entry clause did not provide for the monthly ascertainment or payment of any deficiency arising upon the reletting of the premises, the landlord would not be entitled to recover any portion of such deficiency until the entire amount of such deficiency was ascertained, *i. e.*, until the expiration of the term of the lease. **HARDING v. AUSTIN**..... 564

3. — *Clause in a lease which makes section 197 of the Real Property Law inapplicable thereto.]* The following clause contained in a lease: "The tenant shall, in case of fire, give immediate notice thereof to the landlord, who shall thereupon cause the damage to be repaired as soon as reasonably and conveniently may be, but if the premises be so damaged that the landlord shall decide to rebuild, the term shall cease, and the accrued rent be paid up to the time of the fire," removes the leased premises from the operation

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of section 197 of the Real Property Law (Laws of 1896, chap. 547), which provides that "where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause, as to be untenantable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner rent for the time subsequent to the surrender."	
ROMAN v. TAYLOR	449
4. — <i>What injury to demised premises from water used in extinguishing a fire in another part of the building renders the premises untenantable.]</i> What damage to demised premises caused solely by water used in extinguishing a fire in another portion of the building, of which the demised premises were a part, renders the premises untenantable and unfit for occupancy and entitles the tenant, in the absence of a contrary provision in the lease, to vacate them, pursuant to section 197 of the Real Property Law, considered. <i>Id.</i>	
5. — <i>Power of the lessor's agent to accept a surrender of the demised premises.]</i> An agent of a lessor, who has authority, without consulting with the lessor, to modify the provisions of a lease by reducing the rent reserved therein, has power, for a valid consideration passing from the lessee, to waive a provision in the lease that no surrender of the premises shall be valid unless accepted by the landlord in writing, and to accept such a surrender orally.	
If, in reliance upon the agreement with the agent, the lessee pays a month's rent in advance and vacates the premises before the expiration of such month, and the lessor then takes possession of the premises and relets them for a term extending beyond the term of the original lease, the lessee cannot be held responsible for rent accruing after she has vacated the premises, at least where she received no notice from the lessor that the arrangement with the agent will not be carried out.	
GOLDSMITH v. SCHROEDER.....	206
6. — <i>What lease does not provide for payment of the rent in advance.]</i> Where a lease provides for the payment of an annual rent of \$1,500 in equal monthly installments on the first day of each and every month during the term, the monthly payments are for the rent which accrued during the preceding month. <i>Id.</i>	
7. — <i>Covenant by a lessee to make all repairs to and in every respect to maintain said property — it does not require him to rebuild where without his fault a factory building collapses.]</i> A lease of two factory buildings for a period of ten years, by which the lessee covenants to "make all repairs of whatever kind or description to said property, keep roof and all outside in order, and in every respect maintain said property so that there will be no expense whatsoever to party of the first part other than the regular City tax (except water tax) and the insurance. * * * And that at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted," does not, in the event of the collapse of the buildings, not due to any negligence on the part of the lessee, or to his failure to repair any defects discoverable upon a reasonable inspection of the premises, impose upon the lessee the duty of rebuilding the premises. DUCKER v. DEL GENOVESE. 575	
8. — <i>Construction of words ejusdem generis.]</i> The covenant must, in respect to the lessee's duty to make repairs, be construed upon the principle that where words of general description are associated with words of particular description the general words, in the absence of anything clearly manifesting a contrary intent, shall be limited so as to be <i>ejusdem generis</i> with the particular words. <i>Id.</i>	
9. — <i>Construction of the language of a promise.]</i> If the language of a promise may be understood in more senses than one, it is to be interpreted in the sense in which the promisor had reason to believe that it was understood. <i>Id.</i>	

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10. — *Statements made without knowledge whether they are true or not.]* Where a party, for the purpose of inducing another to contract with him, states, on his personal knowledge, that a material fact does or does not exist, without having knowledge whether the statement is true or false and without having reasonable grounds to believe it to be true, he is liable in fraud, if the statement is relied on and is subsequently found to be false.

PRAHAR v. TOUSEY..... 507

11. — *Rule of caveat emptor applied to a lessee.]* The lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor covering that subject. The tenant hires at his peril. A rule similar to that of *caveat emptor* applies and throws on the lessee the responsibility of examining as to the existence of defects in the premises and of providing against their ill effects. *Id.*

12. — *When a tenant may vacate the demised premises under the statute.]* Chapter 345 of the Laws of 1860, which is now incorporated in the Real Property Law (Laws of 1896, chap. 547, § 197), authorizing a tenant to vacate the demised premises under certain circumstances, does not apply to a case where the defect on account of which the tenant vacates the premises existed when the lease was made and no fraud or misrepresentation is shown on the part of the landlord, or when it results from the neglect of the tenant to make ordinary repairs, or from deterioration due to the ordinary use by the tenant. *Id.*

13. — *Fraudulent representations to induce a tenant to rent property for a printing establishment — what proof does not establish their existence.]* A tenant, who hired premises for use as a printing establishment, removed therefrom prior to the expiration of the term owing to the fact that the public authorities of the city in which the leased building was located limited the speed of the printing presses upon the ground that the vibration, engendered when the presses were operated at full speed, endangered the building.

The lessor then brought an action against the lessee to recover rent under the lease. The lessee interposed an answer alleging that he was induced to enter into the lease by the fraudulent representations of the lessor to him that the building was adequate for the use to which he intended to devote it.

Held, after a consideration of the evidence adduced at the trial, that a verdict rendered against the lessor on the issues of fraud was not supported by the evidence. *Id.*

14. — *Breach of a contract to repair, causing personal injuries.]* An agreement by a lessor to repair the demised premises creates a purely contractual relation, and his failure to perform such agreement will not render him liable in damages for personal injuries sustained by the lessee's wife in consequence of such failure. *STELZ v. VAN DUSEN.....* 358

— Negligence — liability of a landlord for injuries resulting from defects in a window sash — duty of the landlord to advise the tenant thereof.

SMITH v. DONNELLY..... 569
See NEGLIGENCE.

— Negligence — injury to a tenant who while leaning upon a rotten railing of a balcony in the rear of a tenement house, falls into the yard.

CLARKE v. WELSH..... 393
See NEGLIGENCE.

— Proof required of a claim for rent against a decedent's estate where no demand therefor was made against him. *GENET v. WILLOCK.....* 588
See EXECUTOR AND ADMINISTRATOR.

LEASE :

See LANDLORD AND TENANT.

LEGACY :

See WILL.

LIBEL — *Innuendoes not justified by the publication do not, where it is libelous per se, take the case from the jury.]* 1. Where the plaintiff in an action of libel, by innuendoes or allegations of that nature, has attributed meanings to the alleged libelous publication which are unsupported by its language,

LIBEL — *Continued.*

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the court may, nevertheless, if the publication is libelous *per se*, submit the case to the jury.

If the tendency of a written or published article is to disgrace, or bring into ridicule or contempt, the person concerning whom it is written or published, the article is libelous *per se*. *MARTIN v. PRESS PUBLISHING Co.*..... 531

2. — *What article as to the poverty of a college professor brings him into ridicule and is libelous per se.*] A newspaper article read as follows: "Savant cannot make a living. Old Oxford Professor and family in sad straits. That the battle for existence is not won by brains alone is illustrated in the sad plight of Prof. Alfred Nolan Martin, at Richmond Park, Staten Island. A man of extraordinary attainments in classical learning and once a professor in Oxford University, he is now in sad straits because his education hampers him in earning a living. He is living with his young wife and two small children in a house which has not a single door or window inclosed. He is too poor to furnish his dwelling and too proud to ask aid. His neighbors say he is starving. In his life—he is now over fifty—Prof. Martin has been, besides an Oxford professor, a sanitary engineer, a lecturer, a social adjudicator, a school teacher and an author. Seven years ago, while with the Staten Island Health Department, he married Miss Cooper, of Stapleton, a graduate of the New York University Law School. Then he lost his place."

Held, that the article exposed the person referred to therein to public ridicule and tended to abridge his comfort and to injuriously alter his station in society, and was, consequently, libelous *per se*. *Id.*

8. — *Where it refers to a hotel and not to the proprietor a complaint must allege special damages.*] A newspaper article stating that a hotel was frequented by vicious characters; that it had a bad reputation; that an unsuccessful attempt had been made to close it, and that the physician who performed an autopsy on a murdered woman believed that the murderer would be found in such hotel, refers to the hotel and not to the hotel proprietor.

Consequently, the complaint in an action of libel brought against the publisher of such article by the hotel proprietor does not state facts sufficient to constitute a cause of action unless it alleges special damage.

MAGLIO v. NEW YORK HERALD Co...... 546

LICENSE — *To sell liquor.*

See INTOXICATING LIQUOR.

LIEN — Failure of a party furnishing merchandise to file a mechanic's lien — effect of, on an agreement by a grantee of the premises to pay for the merchandise used upon the premises. *HURD v. WING.*

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See CONTRACT.

LIMITATION OF ACTION — *Collateral pledged to secure a note — Statute of Limitations.*] 1. Where the maker of a note, payable in four months after its date, as collateral security for the payment thereof, delivers to the payee a certificate of stock and allows such certificate to remain in the possession of the payee for more than ten years after the payment of the note without making any demand for the return of such certificate, an action subsequently brought by the maker to recover possession of the certificate is barred by the Statute of Limitations. *BROWN v. BRONSON.*..... 312

2. — *It is not from the date of a demand by the pledgor for the collateral.*] Such a case does not come within the second exception contained in section 410 of the Code of Civil Procedure, which provides: "Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete; except in one of the following cases: * * * 2. Where there was a deposit of money, not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand." *Id.*

— Purchase of premises at a foreclosure sale by the guardian in socage of the infant owner — Statute of Limitations governing an action by the

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infant to disaffirm it — she need not wait until she has attained her majority to disaffirm it. *CAHILL v. SEITZ* 105
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— Transfer of corporate stock to be used for a specified purpose — its use for another purpose justifies a rescission of the transaction — Statute of Limitations applicable — it runs from the discovery of the fraud.

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— Money paid upon account of a bill consisting of a number of items will, in the absence of an agreement to the contrary, be applied on the oldest items. *HURD v. WING* 62
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— Transfer tax — refunding of money by the State Comptroller — when an application therefor is not barred by the Statute of Limitations — the Code provisions are not applicable. *MATTER OF HOOPLE* 486
See TAX.

— A deed executed by one of two executors having a power of sale is void — when a party claiming under such a deed acquires a good title under the Statute of Limitations. *BROWN v. DOHERTY* 190
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LIQUOR SELLING — *Regulation of.*

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LIQUOR TAX CERTIFICATE :

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LIS PENDENS :

See PRACTICE.

LOAN — *Commission of a real estate broker for procuring.*

See PRINCIPAL AND AGENT.

LOTTERY — *Definition of the term "lottery."* 1. The term "lottery," as defined in section 328 of the Penal Code, which provides "A lottery is a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance whether called a lottery, raffle or gift enterprise, or by some other name," only includes schemes for the distribution of money and other property exclusively, or practically exclusively, by chance. *PEOPLE EX REL. ELLISON v. LAVIN* 292

2. — *A distribution of money and cigars to constitute a lottery must depend exclusively upon chance.*] A corporation, for the purpose of advertising cigars, in the sale of which it was interested, offered to distribute a sum of money and a quantity of cigars among "The persons who estimate nearest to the number of cigars on which \$8.00 tax per thousand is paid during the month of November, 1903, as shown by the total sales of stamps made by the United States Internal Revenue Department during November."

The competition was restricted to persons sending to the corporation a certain number of bands taken from the cigars which the corporation was advertising, but no discrimination in the price of such cigars was made between purchasers thereof who participated in the guessing contest and those who did not.

For the purpose of those sending estimates the corporation published the statistics showing the number of cigars for which revenue stamps had been issued in each month from January, 1900, to November, 1902.

Hold, that the corporation was not engaged in conducting a lottery, as the distribution of the money and cigars did not depend exclusively or practically exclusively upon chance. *Id.*

MANSLAUGHTER — *What indictment sufficiently alleges the causal connection between the death and the act of the accused — when the time of the commission of the crime is sufficiently stated.*

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MASTER AND SERVANT — <i>Act done within scope of employment.</i>] A master may be held liable for the acts of his servant within the general scope of his employment while about the master's business, even though the servant's acts be negligent, wanton or willful.	
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— Bond given by a pharmacist to obtain a liquor tax certificate — sale by the pharmacist's clerk of liquor without a physician's prescription in violation of his master's instructions — it will sustain an action on the bond.	
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— <i>Injury of a servant through negligence.</i>	
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<i>See LIEN.</i>	
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MISJOINDE — <i>Action by the holder of a certificate issued by an insurance association, on behalf of herself and parties similarly situated, to establish her claim, to compel the directors of the association to account for moneys which they had misappropriated, and to procure the removal of the receiver of the association and the appointment of a new receiver — when the complaint states but one cause of action.]</i> 1. The complaint in an action brought by a creditor of the United States Mutual Accident Association of the city of New York on her own behalf and on behalf of all others similarly situated, alleged that the association was indebted to her in the sum of \$10,000 upon a membership certificate issued by it; that certain defendants, who were directors of the association, had, in violation of the duties which they owed to the plaintiff and to others, wasted, misappropriated and converted to their own use the funds and property of the association which came into their hands as directors; that, by reason of such misconduct, the association became insolvent, and that the defendant Gray had been appointed receiver thereof.	
The complaint further alleged that Gray, as such receiver, had been guilty of extravagance, negligence, inattention, inefficiency and disregard of his duties, and that he had refused to bring an action against the derelict directors; that his conduct had been such as to indicate that he was an improper person to bring such an action, even if he were willing to do so, and that there were many other persons and creditors in the same situation as the plaintiff who might be in a position to join with her in the prosecution of the action.	
The plaintiff demanded judgment that the existence and amount of her claim be established; that the defendant directors be compelled to account for their conduct and misconduct and to pay over to a receiver whatever money the court should adjudge that they had misappropriated; that Gray should be removed from his position as receiver and some other proper person appointed in his place and that he might be held personally liable in certain contingencies.	
<i>Held,</i> that the complaint did not state more than one cause of action.	
That allegations of the complaint that the defendant directors owed certain duties to the holder of the membership certificate in the way of retaining and investing various moneys while superfluous, and an allegation that the defendant Gray had been guilty of extravagance, etc., and a prayer for relief asking that the defendant Gray be held personally liable in certain contingencies while seeking relief that would not be granted in this action, did not constitute, in either case, a separate cause of action.	
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2. — <i>Joiner of causes of action — a cause of action under section 81 of the Stock Corporation Law and one at common law for a false report by the treas-</i>	

MISJOINDER — *Continued.*

writer of a corporation may be joined.] The complaint in an action to recover damages resulting from the purchase by the plaintiff of stock in a corporation upon the faith of a false report made and issued by the defendant, the treasurer of the corporation, alleged a cause of action under section 81 of the Stock Corporation Law, and also a cause of action at common law. The common-law cause of action was based upon the same allegations as the statutory cause of action, supplemented by further allegations of misrepresentation and allegations stating the scienter of the defendant. The amount of damages demanded in each cause of action was identical.

Held, that the common-law and the statutory cause of action were each for an injury to personal property and might properly be joined in the same complaint under subdivision 6 of section 484 of the Code of Civil Procedure;

That the two causes of action were not inconsistent.

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MISREPRESENTATION :

See FALSE REPRESENTATION.

MISTAKE — *Remedy to correct.*

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MONOPOLY — *A contract which contains no provision as to maintaining rates or preventing competition, and does not fix prices nor confine dealings to a combination of persons, does not violate the United States statutes relating to monopolies.*

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MORTGAGE — *Motion by a purchaser to be relieved from a purchase at a mortgage foreclosure sale — what deed is not an exercise of a power of sale — a deed and declarations made by a widow and children, insufficient where there are contingent remainders.]* Upon a motion by the purchaser at a mortgage foreclosure sale to be relieved from his purchase, it appeared that the property was conveyed by deed to Cornelius C. Poillon and Richard Poillon as tenants in common; that Cornelius C. Poillon died, leaving surviving him a widow and five children; that, by the terms of his will, he directed his executors to divide his estate into three equal shares, to pay to the widow during life in lieu of dower the income of one of the shares, the principal of such share being devised and bequeathed upon her death to his children, to be divided equally among them, "the issue of any deceased child or children to take the share which his, her or their parent would have been entitled to if living;" that the will also empowered the testator's executors to sell his real and personal estate, "either for cash or part on bond and mortgage, as they may in their discretion deem advisable."

It further appeared that after the testator's death his widow and surviving children and his executors executed to the said Richard Poillon a deed which recited, "whereas the said Cornelius Poillon (lately deceased) and the said Richard Poillon party hereto of the fourth part were heretofore in the lifetime of the said Cornelius seized as tenants in common of the real estate hereinafter described with other property and the parties hereto have arranged a division of all said real estate held in common whereby the property hereinafter described belonged to the said party of the fourth part and the said party of the first part accepts the provision made for her by the will of said Cornelius Poillon, deceased, in lieu of her dower in his real estate," and which, in consideration of the conveyance by Richard Poillon to the sons of the said Cornelius C. Poillon of the shares in the real estate which had been set off to them in the division, granted and conveyed to Richard Poillon the premises in question.

In answer to the purchaser's motion, one of the executors of Cornelius C. Poillon alleged that the property in question was partnership property belonging to a copartnership consisting of Cornelius C. Poillon and Richard Poillon, having been purchased with partnership funds and should be treated as personal property.

The court having granted the purchaser's motion, formal declarations to the effect that the property was partnership property were executed, acknowledged and recorded by the surviving executor of Richard Poillon and by the widow, executors and surviving children of Cornelius C. Poillon.

MORTGAGE — *Continued.*

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A motion was then made to vacate the order relieving the purchaser from his purchase.

Held, that the deed to Richard Poillon could not be regarded as an exercise of the power of sale conferred on the executors of Cornelius C. Poillon;

That such deed was not sufficient to pass the title vested in the heirs of Cornelius C. Poillon, as it did not and could not dispose of the interest passing, upon the widow's death, to the issue of deceased children of the testator;

That, even if the shares passing to the testator's children were vested, they were subject to be divested in favor of their issue by their death prior to that of the widow;

That, assuming that the declarations that the property in question was partnership property were sufficient to effect a conversion of such property into personalty, an adjudication to that effect would not be binding upon a future claimant under the will of the said Cornelius C. Poillon, and that a purchaser of the premises would be compelled to resort to parol proof if his title was attacked by such a claimant;

That, consequently, the motion to vacate the order relieving the purchaser from his purchase should have been denied. *HUBER v. CASE*..... 479

— Deed absolute in form executed as security for a debt — agreement by the grantee to reconvey the land within one year on repayment of the debt — execution by the grantor to the grantee of a general release — the grantor cannot subsequently maintain an action to redeem the premises — such a conveyance is not invariably a mortgage — the parties may agree that if the debt is not repaid within the specified time the grantee's title shall become absolute. *LUESENHOP v. EINSFELD*..... 68

See VENDOR AND PURCHASER.

— Agreement by a second mortgagor to bid in the mortgaged property for the benefit of the mortgagor at a foreclosure sale under the first mortgage — it does not impose an obligation to complete the sale by paying the amount of the bid and to hold the title for the mortgagor's benefit — its effect on a second sale — effect of letters written between the parties — no confidential relation creating a trust *ex malicio*. *MACKALL v. OLcott*..... 232

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— Purchase of premises at a foreclosure sale by the guardian in socage of the infant owner — it is voidable by the infant — she need not wait until she has attained her majority to disaffirm it — Statute of Limitations — *bona fide* purchasers from the guardian in socage are protected — notice to such purchasers — facts appearing in the judgment roll in the foreclosure action — purchaser's duty as to the examination of title. *CAHILL v. SEITZ*..... 105

See GUARDIAN AND WARD.

— Money given to the secretary of an investment company for a mortgage — liability of the company where the mortgage proves to be a forgery — the fact that the secretary has acted as attorney for the lender in other matters does not relieve the company — plea of *ultra vires* by the company — company not discharged because the mortgage was given by a third person.

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— Will directing the executors thereof to pay a mortgage upon property in which the testator's son has a life estate — purchase of the property by the executors upon a foreclosure of the mortgage — when they acquired a good title as against judgment creditors of the son who were parties to the foreclosure action. *MARSHALL v. UNITED STATES TRUST CO*..... 252

See EXECUTOR AND ADMINISTRATOR.

— Fire insurance policy containing a mortgagee clause — the mortgagee's right to recover is dependent upon that of the insured — the mortgagee is a necessary party to an action brought by the insured upon the policy — jurisdiction, where the mortgagee is a non-resident.

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See INSURANCE.

— Satisfaction of a mortgage, under an agreement by the debtor to pay the debt — action by an assignee of the original creditor to recover an unpaid

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balance — when it is based on the promise and not on the bond — if on the bond the obligee is a necessary party. <i>HOLMES v. ELY</i>	390
<i>See PLEADING.</i>	
— Obligation of a reorganization committee for a failure to file the plan of reorganization prior to a mortgage foreclosure sale, considered.	
<i>INDUSTRIAL & GENERAL TRUST (LTD.) v. TOD</i>	263
<i>See CORPORATION.</i>	
— Bond and mortgage — title thereto may be transferred by mere delivery. <i>MAHNKEN CO. v. PELLETREAU</i>	420
<i>See BOND.</i>	
MOTION AND ORDER — Attachment — affidavit on information and belief that defendant had made no designation of a person on whom service could be made — sustained by an informal county clerk's certificate — failure of a warrant to recite the grounds thereof.	
<i>See ENNIS v. UNTERMYER</i>	375
— Order of arrest — when the moving papers fail to show personal knowledge by the affiant of the fact that alleged false representations were made by the defendant to a commercial agency.	
<i>See PRICE v. LEVY</i>	274
— Pleading — an answer required to state definitely whether a contract set up in the complaint is admitted or denied — time to move for such relief where the answer is served by mail.	
<i>See BORSUK v. BLAUNER</i>	306
— Examination of a party before trial — not granted to enable a plaintiff to learn whether he has a cause of action — knowledge of the matter by other witnesses.	
<i>See KNIGHT v. MORGENROTH</i>	424
— Motion that a question of fact be submitted to the jury — it is reasonable when made after the direction of a verdict.	
<i>See ELDREDGE v. MATHEWS</i>	356
— Stay, because of the non-payment of costs — a copy of the order imposing the costs must be first served.	
<i>See SIRE v. SHUBERT</i>	324
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<i>See DRUMHELLER v. CITY OF MOUNT VERNON</i>	596
MUNICIPAL CORPORATION — City of New York — it is not liable upon certificates of indebtedness issued by the Flushing avenue improvement commission. ¹ 1. The act (Laws of 1878, chap. 410, as amd. by Laws of 1880, chap. 318; Laws of 1881, chap. 826; Laws of 1884, chap. 300) for the improvement of Flushing avenue, located within the corporate limits of Long Island City, which is now a part of the present city of New York, committed the performance of the work to certain persons designated therein, who were styled "the Flushing Avenue Improvement Commissioners."	
The act provided that the cost of the improvement should, in the first instance, be met by certificates of indebtedness signed by the commissioners and countersigned by the treasurer and receiver of taxes of Long Island City — that such certificates of indebtedness should be paid out of assessments on the property benefited, which the commissioners were authorized to levy; that the assessments, which were made a lien upon the property assessed, should be paid to the treasurer and receiver of taxes of Long Island City; that if any assessment should remain unpaid for a period of eight years, the treasurer and receiver of taxes of Long Island City, "or such other officers as shall then be authorized by law to sell lands situate in said city for non-payment of city taxes," should sell the property assessed in the same manner as though the sale were for unpaid city taxes; that the treasurer and receiver of taxes of Long Island City should keep all moneys received	

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by him on account of the assessments in a separate fund, and should use such funds for the sole purpose of paying the certificates of indebtedness; that he should be liable upon his official bond for the faithful discharge of the duties imposed upon him by the act; that if there should be any excess to the credit of the improvement fund after the payment of the certificates of indebtedness, it should be paid into the city treasury and applied in reduction of the city taxes levied upon the property assessed.

The statute contained no provision which, in express terms, made Long Island City liable for the payment of the certificates of indebtedness issued thereunder.

Held, that the improvement commission was not a duly authorized board of Long Island City; that no duty was imposed upon the city with respect to the improvement, and that it was not liable upon the certificates of indebtedness issued by the commissioners;

That, consequently, the city of New York was not liable upon such certificates under section 4 of the Greater New York charter (Laws of 1897, chap. 878), which provides that "all valid and lawful charges and liabilities now existing against any of the municipal or public corporations, or parts thereof, which by this act are made part of the corporation of The City of New York," should be paid by such city;

That the duties imposed by the act upon any officer of Long Island City were not imposed upon him in his capacity as an officer of the city, but as a person designated in the act to perform the duties prescribed therein.

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2. — *Removal of the water registrar of Brooklyn — he is not the "head of a bureau."*] The water registrar for the borough of Brooklyn in the department of water supply, gas and electricity of the city of New York is not the "head of a bureau" within the meaning of section 1543 of the charter of the city of New York (Laws of 1897, chap. 878, as amd. by Laws of 1901, chap. 468), which provides: "But no regular clerk or head of a bureau, or person holding a position in the classified municipal civil service subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation."

The position of "water registrar" created by section 2 of title 15 of the charter of the former city of Brooklyn (Laws of 1888, chap. 583), which organized a "bureau for the collection of the revenue arising from the sale and use of water, the chief officer of which shall be called the 'water registrar,'" was completely abolished on January 1, 1898, by virtue of section 1615 of the Greater New York charter.

In view of the provision of section 458 of the charter of 1897, authorizing the commissioner of the department of water supply to organize such bureaus as he should from time to time deem necessary to the proper discharge of the duties of his department, and directing that he locate a branch of each of the bureaus so organized in the public hall or building of the borough of Brooklyn for the discharge of all the duties of the department devolving upon such bureau or bureaus, so far as such duties appertain to the borough of Brooklyn, and of the fact that the commissioner of water supply of the city of New York, pursuant to such authority, organized two bureaus, viz., the bureau of civil engineers and the bureau for the collection of revenue derived from the sale and use of water in the city of New York, the chief officer of which latter bureau he directed should be known as water registrar, and of the further fact that the commissioner directed that a branch office of the latter bureau should be maintained in the municipal building of the borough of Brooklyn, it cannot be said that the chief officer of the Brooklyn branch was the "head of a bureau" within the meaning of section 1543 of the charter. PEOPLE EX REL. EASTMOND v. OAKLEY..... 535

3. — *Mount Vernon — employment of men to aid in the construction of a sewage disposal plant — they must be existing employees of the commissioner of public works.*] Section 122 of the charter of the city of Mount Vernon (Laws of 1892, chap. 182) provides: "The said commissioner of public works shall have the power to employ such men as may be required to perform any public work not done by contract and to discharge them, the number to be employed at any one time to be subject to the direction and control of the common council."

MUNICIPAL CORPORATION — *Continued.*

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The common council of the city passed a resolution relative to a sewage disposal plant, and the employment of Snow and Barber, sanitary engineers, to design and supervise the construction thereof, which provided, among other things, as follows: "The said city to co-operate with the said Snow and Barber by furnishing such data and requisite assistance from the Department of Public Works and City Engineer and other city departments as the said engineers may call for, the services of the Corporation Counsel, and such labor and material and tools as may be needed in digging test-pits and other work where ordinary labor and tools are required."

Snow and Barber having made requisition upon the commissioner of public works for engineering assistants, one Drumheller, an employee of the commissioner, with the latter's knowledge, furnished such assistants at a cost of \$765 from his private office force, and not from his assistants in the city's employment.

Held, that Drumheller was not entitled to recover such sum from the city;

That the resolution of the common council contemplated that the engineering assistance was to be furnished from the existing employees of the commissioner of public works;

That the fact that the engineering force was insufficient, owing to the pressure of other public work, did not justify the assumption of power to employ additional assistants. **DRUMHELLER v. CITY OF MOUNT VERNON...** 596

4. — *New York Municipal Court — a demand for a jury trial by the defendant after his default has been opened, held to be sufficient.]* In an action brought by an attorney and counselor at law in the Municipal Court of the city of New York to recover the value of professional services rendered by him to the defendant, the latter suffered judgment to be taken against him by default. Thereafter the default was opened upon the condition, among others, that an answer should be filed on or before November 6, 1908. When this direction was made, the counsel for the defendant asked for a jury trial and offered to pay the clerk for a venire. The application was denied by the court.

The defendant filed his answer on November 6, 1908, and renewed his motion for a jury trial and his tender, but the application was again denied.

Held, that under section 231 of the New York Municipal Court Act (Laws of 1902, chap. 580), which provides, "At any time when an issue of fact is joined, either party may demand a trial by jury, and unless so demanded at the joining of issue, a jury trial is waived," the defendant's application for a jury trial should have been granted;

That the provision of section 145 of the Municipal Court Act, that issue in certain cases must be joined on the return day of the summons, except as otherwise specially prescribed in the statute, did not necessitate a holding that issue was joined in the case at bar when the defendant's default was taken;

That the opening of the default left the parties to the action in exactly the same position which they occupied before the return day of the summons, except in so far as the order opening the default imposed conditions upon the defendant. **LEVY v. ROOSIN**..... 387

5. — *Commission to open a village street — report which includes in the expenses thereof an item of \$900 for grading — it will be vacated, not sent back for correction — right of property owners to object.]* The village of Port Chester, acting under title 5 of its charter (Laws of 1868, chap. 818), procured the appointment by the County Court of a commission to open and extend a street. The village authorities, however, included in their expenditures not only the sum necessary to secure the land and open the street, but \$900 for grading the same. The commissioners made a report in which they attempted to assess the total expense upon the property benefited, although the charter (Tit. 5, §§ 28, 24) required that assessments for grading should be made by commissioners appointed by the village board of trustees.

Held, that the report and assessment of the commissioners were properly vacated;

That, as the error in the proceedings went to the jurisdiction of the commissioners, it would be useless to send the report back for correction;

That the property owners affected by the proceedings had a right to insist that the statutory provisions intended for their security should be observed,

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notwithstanding the fact that they might have suffered no harm from the failure of the village authorities to comply with them.	
MATTER OF LOCUST AVENUE.....	416
6. — <i>White Plains Water Act — the control of the water system is given to the water commissioners — not to the village trustees — the duty of the latter is confined to providing money for its maintenance.] Under the White Plains Water Act (Laws of 1896, chap. 769) the control and management of the water system is not within the control of the village board of trustees; the sole duty of the latter body is to provide the necessary funds.</i>	
Where the board of water commissioners certify to the board of trustees that certain sums of money are necessary for the extension or maintenance of the water system, it is the duty of the board of trustees to provide such sum.	
The board of trustees has no power to require the board of water commissioners to state how they have expended the money which came into their possession, or to determine the necessity of purchasing property which the board of water commissioners contemplate purchasing.	
PEOPLE EX REL. HUSTED v. BOARD OF TRUSTEES.....	509
7. — <i>Authority of the court over public officers.] In the absence of a direct and sustained charge of illegality, or a direct and sustained charge of fraud, the court has no authority to interfere with public officers in the discharge of their duties. Id.</i>	
8. — <i>New York city — charge for the use of a wharf for the first twenty-four hours.] Section 862 of the revised Greater New York charter (Laws of 1901, chap. 466), which provides: "It shall be lawful for the owners or lessees of any pier, wharf, or bulkhead within The City of New York, to charge and collect the sum of five cents per ton on all goods, merchandise and materials remaining on the pier, wharf or bulkhead owned or leased by him, for every day after the expiration of twenty-four hours from the time such goods, merchandise and materials shall have been left or deposited on such pier, wharf or bulkhead, and the same shall be a lien thereon," does not prevent wharfingers from entering into special contracts for the use of their wharves for the first twenty-four hours.</i>	
INTERNATIONAL HIDE CO. v. N. Y. DOCK CO.....	563
9. — <i>Implied contract.] If no special contract is made, the wharfinger is entitled to recover upon an implied contract the reasonable value of the use of his wharf during such first twenty-four hours. Id.</i>	
10. — <i>Patented article — action of New York city in inviting proposals therefor — when "a fair and reasonable opportunity for competition" is not afforded.] The action of the authorities of the city of New York, when inviting bids for the furnishing of water meters for the use of that city, in limiting them to a certain type and size of meter in such a manner as to call for bids only upon a patented meter, under conditions calculated to practically exclude competition, constitutes a violation of section 1554 of the revised New York charter (Laws of 1901, chap. 466) which provides that "no patented article shall be advertised for, contracted for or purchased, except under such circumstances that there can be a fair and reasonable opportunity for competition, the conditions to secure which shall be prescribed by the board of estimate and apportionment." KAY v. MONROE</i>	434
11. — <i>Injunction by a taxpayer.] A taxpayer, who brings an action to restrain the city authorities from carrying out a contract entered into pursuant to such bids, is entitled to an injunction <i>pendentis lite.</i> Id.</i>	
12. — <i>Appeal from the City Court of Yonkers to the Appellate Division — interest on the amount claimed, considered.] Under section 1 of title 9 of chapter 416 of the Laws of 1898, which provides that appeals from the City Court of Yonkers shall not be taken to the Appellate Division of the Supreme Court unless the action is brought to recover \$100 or more, the Appellate Division has jurisdiction of an appeal from an order made in an action brought in the City Court of Yonkers to recover the sum of \$99 with interest, where, at the time the complaint was verified, such interest would raise the amount which the plaintiff sought to recover to a sum in excess of \$100. RICHARDSON & BOYNTON CO. v. SCHIFF.....</i>	388

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13. — *New York police — trial before a deputy police commissioner, who, without deciding upon the guilt of the accused, reports the evidence to the commissioner.]* A deputy police commissioner of the city of New York may not conduct the trial of a member of the police force upon charges preferred against the latter and thereafter report the evidence to the police commissioner without determining the guilt or innocence of the accused member, or making any recommendation in respect thereto, and leave to the police commissioner the duty of passing upon the sufficiency of the evidence in the absence of the accused officer, and without notice to him or giving him an opportunity to be heard.
 PEOPLE EX REL. HOFFMANN v. PARTRIDGE..... 473
14. — *An adjudication by the commissioner is void.]* In such a case the act of the police commissioner in adjudging the accused member guilty and dismissing him from the force is void. *Id.*
15. — *Power of a municipality over its streets.]* A municipal corporation holds its public streets and places in trust for the public, and the power to regulate their use is vested in the Legislature absolutely. It may delegate that power to the municipal corporation, but any act by the corporation, not within the strict or implied terms of its chartered powers, is invalid.
 MATTER OF RHINEHART v. REDFIELD..... 410
16. — *It is an agency of the State.]* A municipal corporation, in the machinery of the State, is a mere agency. It possesses no inherent and independent authority to create rights in others, which affect the public. *Id.*
17. — *Notice of the limitations on its powers.]* Parties dealing with municipal corporations are bound to take notice of the limitations imposed upon their powers. *Id.*
18. — *Grant of a franchise — how construed.]* An act conveying franchises or special privileges is to be construed most favorably to the People, and all reasonable doubts in construction must be solved against the grantee. Words and phrases which are ambiguous, or admit of different meanings, are to receive, in such cases, that construction which is most favorable to the public. *Id.*
19. — *Nature of a franchise.]* A franchise is a special privilege, conferred by government on individuals or corporations, which does not belong to the citizens of a country generally, by common right. *Id.*
20. — *What the grant of a franchise presupposes.]* The grant of a franchise presupposes a benefit to the public, and an equal right on the part of every member of such public, within the territory involved, to participate in this benefit upon the same terms and conditions. *Id.*
21. — *Grant by the common council of Brooklyn of the right to lay pipes in the streets to supply ammonia gas for refrigerating purposes — when the grant is in aid of a private enterprise for the convenience of a limited number of people within a limited district it is void.]* The common council of the city of Brooklyn had no power under subdivision 3 of section 12 of title 2 of the charter of that city (Laws of 1888, chap. 583), which conferred power upon it “To regulate all matters connected with the public wharves and all business conducted thereon, and with all parks, places and streets of the city,” or under section 19 of title 19, or section 22 of title 22 of such charter, to grant individuals a franchise to lay pipes in the streets of the city for the purpose of supplying ammonia gas for refrigerating purposes to the houses and buildings in said city, particularly where it appears that such franchise was granted in aid of a private enterprise and not for the convenience of the general public, but for the convenience of a limited number of people within a limited district. *Id.*
22. — *The performance of conditions, payment of taxes, etc., does not give it validity.]* The fact that the individuals to whom the franchise was granted have complied with the conditions described in said franchise, and that they have in common with other property owners discharged the obligation of paying taxes upon their possessions, or that the granting of this franchise

MUNICIPAL CORPORATION — *Continued.*

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will be beneficial to a number of people, or to the community as a whole, will not justify the court in upholding the franchise, *Id.*

28. — *Practices in New York Municipal Court.*] In the Municipal Court of the city of New York the defense of a non-joinder of parties must ordinarily be raised by answer or it will be deemed to have been waived.

SPARKS v. FOGARTY. 472

— Negligence — construction by an abutting owner of a platform encroaching upon a city sidewalk — pedestrian injured by the collapse of the sidewalk and platform — the city is liable for defects in the sidewalk but not for defects in the platform. **LEGGETT v. CITY OF WATERTOWN.** 80
See NEGLIGENCE.

— A municipality does not insure the safety of travelers upon its highways — its duty to remove accumulations of ice and snow from its streets and crosswalks — when a finding that it was negligent in this respect is against the weight of evidence.

O'SHAUGHNESSEY v. VILLAGE OF MIDDLEPORT. 98
See NEGLIGENCE.

— Action to recover the purchase price of void municipal bonds — the purchaser must return all of such bonds — the return of a portion thereof is insufficient. **CITY OF IRONWOOD v. WICKES.** 164
See CONTRACT.

MUNICIPAL COURT:

See MUNICIPAL CORPORATION.

MUTUAL AID ASSOCIATION:

See INSURANCE.

NEGLIGENCE — *A person killed by touching a broken live electric wire — what is not a refusal to charge — reiteration of a charge is unnecessary — question of fact for the jury — contributory negligence — preoccupation and forgetfulness inconsistent with the conduct of a reasonably careful man.]* 1. In an action brought against an electric lighting company to recover damages resulting from the death of the plaintiff's intestate, who was killed by coming in contact with one of the defendant's electric light wires, it appeared that some time prior to the accident the wire in question was discovered lying on the ground quite close to a boiler house in which the intestate was employed; that the person who discovered the wire removed it some distance away from the only entrance to the boiler house, and that the intestate, who was aware of the deadly character of the wire, placed boards on and around the wire so as to fence it in; that the defendant sent two linemen to repair the wire, and that upon their arrival one of them took the wire near the door of the boiler house and began to splice it.

The intestate returned to the boiler house, but whether he did so before or after the work of repairing had been commenced was disputed. During the progress of the repairs the intestate stepped out of the boiler house backwards and came in contact with the wire and was killed. The witnesses estimated the time during which the intestate was in the boiler house at from five to twenty minutes.

Held, that the question of the defendant's liability was one of fact for the jury, and that a judgment entered upon a verdict in favor of the defendant should be affirmed;

That the following response, made by the court in answer to a request to charge made by the plaintiff, "Yes. I will not touch that any more than I have," was not susceptible of a construction that the court declined to charge the request;

That it was proper for the court to refuse to reiterate, in language suggested by the plaintiff's counsel, a proposition of law which had been theretofore fully and sufficiently charged;

That it was not error for the court, in answer to a request by the plaintiff's counsel for a charge that "the deceased was lawfully in the boiler house, and was not obliged to apprehend danger from a live wire on the ground immediately at the entrance of the boiler house, if it was not there when he

NEGLIGENCE — *Continued.*

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entered the house," to reply, "I will leave all these questions to the jury. It is a question of fact;"

That the following charge, "Whatever was the cause of the breaking of the defendant's wire, and whosoever's fault it may have been, the deceased was required to exercise the care of a reasonably prudent man to avoid contact with the wire, and if he knew its location or if he ought to have known it and neglected to keep a reasonably safe distance from the wire, and, therefore, came in contact with it by accidentally stepping upon it, there can be no recovery in this action," was not objectionable in that the court did not charge that the intestate's negligence must be such as contributed to the accident; that such an objection was hypercritical;

That it was proper for the court to charge that "If the deceased, knowing the proximity of this wire and the danger thereof, became preoccupied in any way and forgot about the danger, and his so doing was a failure to remain as alert and watchful as a reasonably careful man should, under the circumstances, then there can be no recovery in this action;"

That, by such charge, the court did not instruct the jury that a recovery by the plaintiff would be defeated by mere preoccupation and forgetfulness on the part of the intestate, but by a preoccupation and forgetfulness which was inconsistent with the conduct of a reasonably careful man under the circumstances. *BUCKLEY v. WESTCHESTER LIGHTING Co.*..... 486

2. — *Blasting — explosion of one of two dynamite charges creating a fissure communicating with the unexploded charge — injury to a servant by the premature explosion of the latter charge in consequence of the existence of such fissure — when the master is not liable unless he knew of the fissure.]* In an action brought to recover damages for personal injuries, it appeared that the defendants, who were copartners, were engaged in excavating rock by means of dynamite and that the plaintiff was in their employ; that two holes were drilled in the rock six feet apart, one of the holes being drilled in a ledge which was about a foot higher than the ledge in which the other hole was drilled; that the upper hole was four and a half feet long and the lower hole three and a half feet long; that both holes were charged with dynamite and that an attempt was made to explode such dynamite, but that the dynamite in the lower hole did not explode; that by the explosion of the charge in the upper hole a loose rock was thrown on top of the lower ledge of rock near the hole which contained the unexploded charge; that while the plaintiff was attempting to remove the unexploded charge with a metal spoon and while one of the defendants and an assistant were hammering upon the detached piece of rock, the dynamite in the lower hole exploded injuring the plaintiff.

The plaintiff gave evidence tending to show that as a result of the explosion of the charge in the upper hole a seam about a quarter of an inch wide was created which ran through the lower hole, and that the ledge upon which the detached piece of rock lay had itself become somewhat loosened. The plaintiff claimed that the hammering upon the detached piece of rock resting upon the loose rock next to the lower hole communicated a jar to the dynamite in that hole and exploded it.

The evidence established that the explosion could not have been occasioned by the hammering had the seam and the loosening of the adjacent rock not existed. There was no direct evidence that the defendant, James Hallinan, who was present at the time of the accident, knew of the existence of the seam, and the jury might properly have found that he did not have such knowledge.

Held, that it was improper for the court to refuse to charge, "that unless the defendants knew, or the defendant James Hallinan knew, that the rock on the south side of the hole: on the south side of the crack running through the lower hole, was loose at the time of an attempt to split the rock with the wedge that then there can be no recovery;" and, "that the defendant James Hallinan, and consequently the defendants in this case, cannot be guilty of negligence if James Hallinan did not know of the existence of the crack running through the lower hole;"

That, in the absence of evidence that the explosion of the charge in the upper hole was liable to create a fissure running through the lower hole, it was not incumbent upon the defendant James Hallinan, who was present at

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the time of the accident, to make an examination for the purpose of seeing whether that condition existed. <i>MURPHY v. HALLINAN</i>	48

8. — *Death of a boy struck by a street car having no fender — obligation of the company to have fenders on its cars, considered.]* On the trial of an action to recover damages resulting from the death of the plaintiff's intestate, a boy seven and a half years of age, who was run down and killed by one of the defendant's street cars, the jury may properly find that the age of the child was such that he was not chargeable with contributory negligence.

It appeared that the car in question was not provided with a fender, that the accident occurred in the borough of Queens, while the car was running at a speed of twenty miles an hour, and that there was no ordinance in force applicable to the locality requiring street cars to be provided with fenders. A witness for the plaintiff testified, without objection, that he had seen fenders on other cars in New York, Brooklyn and Jamaica for about four years, and that fenders were in general use.

Subsequently the defendant objected to the admission of testimony regarding the use of fenders, but the objection was overruled.

At the conclusion of the charge, the defendant's counsel asked the trial judge to charge "that absence of fenders on the cars of the defendant cannot be considered as negligence or a want of care or prudence."

The court responded as follows: "That I decline, because they may consider the equipment of the car, in connection with the speed at which it was running and all the other things belonging to the use of such a car, as part of the paraphernalia and surroundings and equipment that go to make up the particular car with which the accident happened."

Held, that where a jury is satisfied from the evidence that the injury would have been prevented by the use of a safeguard, such as a fender, which is usually attached to cars of similar construction, operated in similar localities generally throughout the country, and which has proved ordinarily efficacious for the protection of persons upon the highway, they are entitled to predicate negligence upon the omission to provide the cars with such safeguards;

That the jury could not have been misled by the ruling of the trial judge upon the defendant's request to charge, and that a judgment entered upon a verdict in favor of the plaintiff should be affirmed.

Sensible, that it was proper to permit proof of the fact that the car in question was not provided with a fender.

That the presence or absence of a fender had no place in the case as a foundation upon which the jury might rest a charge of negligence against the defendant in the operation or construction of the car; that it simply bore upon the question as to the extent of the injury.

FRIESEN v. NEW YORK & QUEENS Co. R. Co...... 554

4. — *Death on a railroad crossing — failure of a stationary signal bell to ring — failure to show that the deceased looked or listened for the train — what proof is required of freedom from contributory negligence.]* In an action brought to recover damages resulting from the death of the plaintiffs' intestate, it appeared that while the intestate, accompanied by a lady, was driving across the defendant's railroad tracks in a buggy on an August afternoon, the buggy was struck by one of the defendant's trains and the intestate and his companion were killed.

The accident occurred during a heavy rain storm, accompanied by thunder and lightning, and the top of the buggy was up and the side curtains drawn. There was a stationary signal bell at the crossing which was designed to ring when an approaching train was 1,300 feet distant, but this signal bell was out of order at the time of the accident. The train was running at the rate of fifty or sixty miles an hour and no signal of its approach was given.

At one point in the highway the intestate could have seen the train approaching when it was 626 feet from the center of the crossing. The next point at which the train became visible was 23 feet from the crossing, when it could have been seen for a distance of 106 feet. The only evidence as to the conduct of the occupants of the buggy when approaching the track was that the speed of the horse was decreased from a trot to a walk, and that it was walking at the time of the accident.

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Held, that the complaint was properly dismissed, as the plaintiffs had not, either by direct evidence or by inference fairly deducible from the facts proved, shown that the intestate was free from contributory negligence:

That it was incumbent upon the intestate, under the circumstances, to look and listen for an approaching train, and that the mere fact that the stationary signal bell was not ringing did not relieve him from the imputation of contributory negligence if he failed to exercise this degree of care;

That while the absence of contributory negligence need not be established by direct evidence, but may rest upon inferences properly drawn from the surrounding facts and circumstances, an inference of due care cannot be based solely upon the presumption that a person whose life is exposed to danger will adopt proper means to protect himself.

McSWEENEY v. ERIE RAILROAD CO. 496

5. — *Passenger standing up in a street car, grasping a strap, thrown down and injured by a violent jerk of the car—when a charge that the plaintiff was entitled to recover, if the jury found certain facts, is improper.*] Upon the trial of an action to recover damages for personal injuries, sustained by the plaintiff while a passenger upon one of the defendant's street cars, the plaintiff gave testimony tending to show that while standing up in the car, holding on to a strap provided for that purpose, the car, after coming to a stop, started with a violent jerk which caused him to lose his hold upon the strap and to be thrown down and injured.

The court charged, at the request of the plaintiff, and over the defendant's exception, "If the jury find that the particular car upon which the plaintiff was a passenger was caused to start forward without notice or warning to the plaintiff from a position of rest with a sudden and unusual lurch forward, so violent as to cause the plaintiff and other passengers in the car to be thrown in the manner testified to by plaintiff and his witness Minzesheimer, and if the jury further find that the car could have been started by the exercise of a reasonable degree of skill and care on the part of the motorman controlling the car without such sudden, violent and unusual lurch, provided they believe there was such sudden, violent and unusual lurch at all, and if they should further find that the seats in the car were all occupied, and that plaintiff was standing inside the car, holding on to a strap provided for such purpose, at the time of such lurch, and was solely by reason thereof thrown down and received the injuries that were testified to in this case, then the plaintiff would be entitled to a verdict."

Held, that the charge was erroneous, in that it permitted the jury to find the defendant liable, without finding that it had been guilty of negligence, or that such negligence was the proximate cause of the accident, or that the plaintiff was free from contributory negligence;

That the fact that the car had started with a jerk and that it could have been started without a jerk did not establish, as a matter of law, that the defendant had been guilty of negligence; that this question was one of fact for the jury to determine.

GOODKIND v. METROPOLITAN STREET R. CO. 158

6. — *Failure after a fire to take down a wall adjoining a passageway—liability of the owner of the land to one injured by its fall.*] In an action brought to recover damages for personal injuries it appeared that the defendant was the owner of a lot upon which there were two buildings, the rear building being sixty-five feet from the street. Access to the rear building was afforded by an alleyway located wholly upon the owner's premises and adjacent to the east wall of the front building.

On December 20, 1900, the front building was practically destroyed by fire. After the fire the owner conducted a liquor saloon for the accommodation of the public generally in the rear building, access to the saloon being obtained by passing through the alleyway.

January 30, 1901, the plaintiff, a boy under twelve years of age, went into the alley way for the purpose of picking up some tickets which were lying on the ground. While in the alley, about fifteen feet from the street, he was struck and injured in consequence of the falling of a portion of the eastern wall of the front building, which had been in a dangerous condition since the time of the fire.

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Held, that the defendant having invited the public to make use of the alleyway for the purpose of obtaining access to the saloon, a person lawfully in such alleyway was entitled to the same protection against injury from dangerous structures adjacent to the alley as he would have been had the alley been a public highway;

That the question whether the defendant had properly discharged the duty which it owed to the plaintiff was one of fact for the jury, and that it was improper for the court to dismiss the plaintiff's complaint;

That where the life of a building has been destroyed by fire and the walls are no longer used in supporting it, but constitute merely a part of the ruins of the building, it is not a reasonable and proper use of the property to permit the walls to remain standing after the expiration of a reasonable time for investigation and for their removal.

HAACK v. BROOKLYN LABOR LYCEUM ASSN. 491

7. — *Injury to a servant employed under a locomotive in consequence of the moving of the locomotive — failure to promulgate rules for his protection — where one of two rules would be sufficient, negligence cannot be predicated upon a failure to adopt both of them — expert evidence that certain rules were "necessary" is incompetent — it is a question for the jury.]* In an action brought to recover damages for personal injuries, it appeared that the defendant railroad company was accustomed to run locomotives upon a track in the vicinity of a roundhouse for the purpose of having the ashes and cinders removed from their ashpans; that the ordinary process was for a hostler to enter the locomotive and shake down the ashes while another man would crawl under the locomotive and hoe out the contents of the ashpan; that while the plaintiff was under a locomotive performing this work, and after the hostler, who accompanied him, had left the engine, it was set in motion by an engineer and the plaintiff was injured. The negligence alleged on the part of the defendant was its failure to promulgate rules for the plaintiff's protection.

Upon the trial an expert witness was allowed, over the objection and exception of the defendant, to state, in answer to a hypothetical question, that a rule would have been proper to protect the man engaged in hoeing out the ashpan; that such a rule was "necessary;" that there should have been a rule that the hostler should not leave the locomotive until the man engaged in hoeing out the ashes had come from under the locomotive, and also a rule requiring the placing of a red light on each end of the locomotive.

Held, as a matter of law, that the defendant was not required to promulgate and observe both of the rules suggested by the expert witness, as, if the hostler remained upon the locomotive while his fellow-servant was at work hoeing out the pan, it would not be necessary to take the further precaution of placing red lights at each end of the locomotive;

That it was improper to allow the expert witness to testify that the rules suggested by him were "necessary," as it was competent for the jury, when all the facts and circumstances bearing upon the situation had been placed before them, to determine that question for themselves.

LANE v. NEW YORK CENTRAL & H. R. R. Co. 40

8. — *Injury to a tenant who, while leaning upon a rotten railing of a balcony in the rear of a tenement house, falls into the yard.]* A four-story building contained stores on the ground floor and apartments upon each of the upper floors. At the rear of the building were four balconies on a level with the several floors. The balconies were connected by stairways which were used by the tenants of the several apartments in reaching a common cellar and yard. On one occasion, a woman, who resided with her family upon the second story of the building, came down the common stairway to the balcony in the rear of the store on the first floor of the building and leaned over the railing for the purpose of calling to her children who were in the yard below. While in this attitude, the railing fell, precipitating the woman to the ground and causing her to sustain injuries which resulted in her death.

In an action brought against the owner of the building to recover damages resulting from the death of the woman, evidence was given to the effect that the woman weighed about 110 pounds; that the railing was rotted to a degree which could hardly have escaped attention if any reasonable effort

NEGLIGENCE — *Continued.*

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had been made to determine its safety, and that its rotten condition had been concealed by the use of paint.

Held, that a judgment entered upon a verdict in favor of the plaintiff should be affirmed;

That the evidence warranted a finding that the defendant owed the intestate the duty of exercising reasonable care to make the balcony railing in the rear of the store reasonably safe, and that the defendant had been negligent in that respect;

That the intestate had a right to assume that the balcony railing was safe and that the question whether she was guilty of contributory negligence, in leaning upon the railing without making an examination of its condition, was one of fact for the jury. *CLARKE v. WELSH*..... 398

9. — *Excavation by a railroad company of a trench encroaching upon the premises of a station agent — injury to the station agent by falling into the trench — when he cannot be charged, as matter of law, with knowledge of its existence — defense that he would probably have run into a switch even if the trench had not encroached on his premises.]* In an action brought to recover damages for personal injuries, it appeared that the plaintiff was employed as a station agent by the defendant railroad company and that he occupied a house and lot adjoining the railroad lands; that in constructing a derailing switch at the station the railroad company excavated a trench twenty-three inches deep and about three feet wide; that the trench encroached upon the plaintiff's premises for a distance of four feet and was located in the line of a passageway which the plaintiff was accustomed to use extending from the plaintiff's front door to the station; that while the plaintiff was proceeding from his home to the station along this passageway after dark he fell into the trench and was injured.

The plaintiff gave evidence tending to show the existence of certain obstructions which prevented him from seeing or knowing of the trench. It appeared that the derailing switch was located about 125 feet from the station and about 20 feet from the plaintiff's house; that the plaintiff had been advised by the railroad company of the installation of the derailing switch and that under the rules of the railroad company he was charged with the general supervision of the property at and around the station.

Held, that it was error for the court to dismiss the plaintiff's complaint;

That it could not be said, as a matter of law, that the plaintiff knew or should have known of the existence of the trench and was, therefore, guilty of contributory negligence in falling into it;

That the defendant could not be relieved from liability upon the theory that the plaintiff would probably have run into the switch even if it had not encroached upon his premises.

Wood v. N. Y. CENTRAL & H. R. R. Co...... 53

10. — *Construction by an abutting owner of a platform encroaching upon a city sidewalk — pedestrian injured by the collapse of the sidewalk and platform — the city is liable for defects in the sidewalk but not for defects in the platform — admissibility of an affidavit made by a witness as to what another witness had said to him.]* In an action brought against a city to recover damages for personal injuries it appeared that the city maintained a sidewalk leading to a bridge; that an owner of property abutting on the approach to the bridge had constructed in front of his premises a wooden platform, which as claimed by the plaintiff rested upon the sidewalk; that while the plaintiff was standing with one foot on the steps of the platform and the other foot upon the sidewalk, the platform and walk collapsed precipitating the plaintiff into a hole fifteen or twenty feet deep and causing him to sustain injuries.

Held, that it was improper for the court to charge that the plaintiff could recover if the jury found that the platform was in any way connected with the sidewalk, and the injury resulted from a defect either in the platform or the sidewalk;

That the city was not liable for defects in the platform, but only for defects in the sidewalk;

That it was liable for any defect in the sidewalk, whether such defect was inherent in the sidewalk itself or was due to the conjunction of the platform with the sidewalk;

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That it was improper to permit the plaintiff to introduce in evidence, for the purpose of contradicting the testimony given by a witness for the defendant, an affidavit made by such witness which, in addition to the statements about which such witness had been examined, contained an account of a conversation which the affiant had had with another witness in respect to which conversation the other witness was not examined.

LEGETT v. CITY OF WATERTOWN..... 80

11. — *The act of backing one truck against another, and thereby crushing a man between the latter and some boxes, is evidence of negligence — the credibility of the truckman is to be determined by the jury.]* Upon the trial of an action to recover damages for personal injuries, the plaintiff gave evidence tending to show that, while he was standing on a pier behind a one-horse truck which he was assisting in unloading, a large double truck belonging to the defendant was backed against the plaintiff's truck with such force as to break the shafts of the latter truck, throw down the horse attached thereto, and crush the plaintiff between the truck and some boxes which were standing about three feet distant therefrom.

Evidence was also given tending to show that the plaintiff's horse was standing quietly at the time, and that the collision was the result of an effort on the part of the defendant's driver to turn or back his truck upon the pier.

The accident occurred in the daytime, and no claim was made that there was not ample room for both trucks, or that the defendant's driver was prevented in any manner from seeing what he was doing.

Held, that the case should have been submitted to the jury, and that it was error for the court to dismiss the plaintiff's complaint at the close of the evidence on the ground that there was no evidence of the defendant's negligence which would warrant the submission of the case to the jury;

That the credibility of the defendant's driver was a matter for the consideration of the jury. POWLES v. HALSTEAD..... 549

12. — *Boy run over by a street car — when a charge that his negligence in getting upon the track would not defeat a recovery unless it was the proximate cause of the accident, is erroneous.]* In an action brought to recover damages resulting from the death of the plaintiff's intestate, a boy twelve years of age, who was run over and killed by one of the defendant's street cars, the plaintiff gave evidence tending to show that the intestate fell upon the track when the car was some fifty feet distant, and that it could have been stopped within ten feet.

The court charged, at the request of the plaintiff and over the defendant's exception, "even if the jury believe that the boy carelessly or negligently ran or walked on the track, still such carelessness or negligence would not disentitle the plaintiff to recover unless it was the proximate cause of the injury."

Held, that the charge was erroneous;

That the rule embraced therein is applicable only to those exceptional cases wherein it appears that after the initial danger resulting from the negligence of one or both of the parties, there was a second negligent act which was the proximate cause of the injury;

That such rule was not applicable to the case at bar, as the presence of the boy upon the track and the subsequent operation of the car did not present two distinct situations based upon two distinct acts of negligence on the part of the motorman, but constituted a single situation or condition resulting in the accident. McDONALD v. METROPOLITAN STREET R. Co..... 238

18. — *Servant killed by a derrick car falling from a bridge, because of a failure to anchor it — the master, who supplied ropes for anchoring purposes, is not liable because he failed to furnish a chain and turn-buckle for those purposes — contributory negligence — assumed risks.]* In an action brought to recover damages resulting from the death of the plaintiff's intestate it appeared that the latter was employed by the defendant as a craneman on a derrick car, which was standing on a bridge and was being used in hoisting stone from a ravine below; that while a stone was being hoisted, the car, owing to a failure to anchor it to the bridge, fell over into the ravine and the intestate was killed.

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A turn-buckle and chain, which had previously been used to anchor the car, were not in the car at the time of the accident, but it was supplied with ropes suitable for anchoring purposes. The intestate was an experienced workman, who had been employed on the derrick car for a week previous to the accident, and the evidence tended to establish that he had talked with a fellow-workman about the necessity of anchoring the car just before the accident occurred.

Held, that liability on the part of the defendant could not be predicated upon the fact that a turn-buckle and chain were not in the car on the occasion of the accident;

That the intestate was guilty of contributory negligence, and that he assumed the risk of the accident.

WAGNER v. NEW YORK, C. & ST. L. R. R. Co. 14

14. — *Liability of the owners of a department store to a person struck by a swinging door.]* In an action to recover damages for personal injuries it appeared that the defendants were proprietors of a department store, the entrance to which was fitted with swinging spring doors; that while the plaintiff was coming out of the store, another person, who had preceded her through one of the doors, let the door swing back and strike the plaintiff.

The proof showed that similar doors, with springs of the same or greater strength, were in use at numerous like establishments.

Held, that a judgment entered upon a verdict in favor of the plaintiff should be reversed, as the plaintiff's injuries could not be attributed to any fault on the part of the defendants, but rather to the hasty carelessness of a third person, over whose movements and conduct they had no control.

PARDINGTON v. ABRAHAM. 359

15. — *Liability of a landlord for injuries resulting from defects in a window sash.]* In an action brought against a landlord by a tenant to recover damages for personal injuries, which the tenant, while engaged in washing windows in the demised premises, sustained by falling from a window, in consequence of the absence of a stop on the upper sash thereof, it is error for the court to charge that if there was a hidden defect or danger in the premises at the time of the execution of the lease the landlord became liable, irrespective of whether he had knowledge of the defect or danger, or whether he could, in the exercise of reasonable care, have discovered the same.

SMITH v. DONNELLY. 569

16. — *Duty of the landlord to advise the tenant thereof.]* If the landlord knew of the defect, and it was such as a reasonably prudent man would regard as dangerous to tenants, it was his duty to call the tenant's attention to the matter.

Where, however, it appears that the defect in question was but slight and was entirely harmless, except under special conditions not likely to occur at frequent periods, the mere failure of the landlord, who knew of the defect, to call the tenant's attention thereto, will not, in the absence of any question of fraudulent concealment, charge the landlord with liability. *Id.*

17. — *Jurisdiction not assumed by the courts of New York of actions for negligence arising in another State between citizens and residents thereof.]* The courts of the State of New York will not, in the absence of special facts or circumstances, accept jurisdiction of a cause of action for negligence which arose in the State of Connecticut, where both parties to the action are, and have been since the cause of action arose, citizens and residents of that State. **COLLARD v. BEACH.** 339

18. — *Failure to take objection on the first trial — effect of such other State accepting jurisdiction of like cases.]* The fact that the objection to the jurisdiction was not taken upon the first trial of the action, or that the courts of the State of Connecticut will accept jurisdiction of a cause of action for tort arising in the State of New York, where both parties are citizens and residents of the State of New York, is immaterial. *Id.*

19. — *Municipal corporation — it does not insure the safety of travelers upon its highways.]* Municipalities are not insurers of the safety of travelers on the highway, nor are they bound to anticipate every emergency; they are only required to exercise ordinary care and use ordinary diligence.

O'SHAUGHNESSEY v. VILLAGE OF MIDDLEPORT. 98

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20. — *Its duty to remove accumulations of ice and snow from its streets and crosswalks.]* The duty resting upon municipal corporations to remove accumulations of ice and snow as it falls from time to time upon their streets is a qualified one, and becomes imperative only when dangerous formations or obstacles have been created and notice of their existence is received by the corporation. *Id.*

A village cannot be said to be negligent, because, during a period of frequent snow storms and of very cold weather, it failed to remove the accumulated ice and snow from a crosswalk and thus keep the surface of the crosswalk exposed, or because it failed to keep the snow and ice on the crosswalk in a perfectly smooth condition. *Id.*

21. — *When a finding that it was negligent in this respect is against the weight of evidence.]* When, in an action brought against a municipal corporation to recover damages for personal injuries sustained by the plaintiff in consequence of falling upon snow covering a crosswalk, a finding that the municipal corporation was guilty of negligence is against the weight of evidence, considered. *Id.*

— Writ of inquiry issued in an action to recover damages for personal injuries — the court may, in its discretion, direct that it be executed before a judge and a jury drawn from the regular panel.

ELSEY v. INTERNATIONAL RAILWAY CO. 115
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PARTY — <i>Action for goods sold to a copartnership — all the partners must be made parties defendant.]</i> 1. In an action to recover the value of goods sold and delivered to a copartnership, all of the partners must be made defendants. <i>SPARKS v. FOGARTY</i>	473
2. — <i>The defect of parties need not be pleaded where one partner is sued and no mention is made of the copartnership.]</i> Where such an action is brought in the Municipal Court of the city of New York against but one of the partners, and the complaint therein makes no mention of any partnership, the failure to plead the non-joinder of the other partners does not preclude the defendant from raising that objection on the trial. <i>Id.</i>	
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PAYMENT — <i>Voluntary payment — financial distress and inability otherwise to procure a loan does not make a payment involuntary.]</i> 1. While the owners of land located in the city of New York were engaged in erecting a building thereon, the city authorities, deeming the building unsafe, stopped work thereon and altered the foundations thereof. The city filed a li-	

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Held, that the payment was voluntary and that the owners were not entitled to recover the amount thereof from the city.

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PERSONAL PROPERTY — Collateral pledged to secure a note — Statute of Limitations — when it begins to run in such a case in favor of the pledgee — it is not from the date of a demand by the pledgor for the collateral.

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PLEADING — Complaint to recover one-half the profits of a business under an agreement for the use of plaintiff's services and name — not demurrable because it asks for an accounting and receiver — the demand for equitable relief regarded as surplusage — failure to allege the use of plaintiff's name.] 1. The complaint in an action alleged that the defendants were copartners; that, in consideration of the plaintiff giving his services and allowing his name to be used for the purpose of raising the sum of \$21,600 for use in the business, the defendants promised and agreed to give him an equal share in the profits thereof; that the plaintiff superintended the defendants' business and acted for them from August 15, 1902, until February 21, 1903; that the plaintiff's share of the copartnership profits for such period was \$5,000 or more which was unpaid; that the defendants had failed or refused to account for such share of the profits, and that an accounting was necessary to determine the true amount due and payable to the plaintiff.

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The plaintiff asked for an accounting and for the appointment of a receiver; also "that said defendants may be compelled to pay said plaintiff the said sum of five thousand (\$5,000) dollars, or such sum as may be due him as his share of the profits aforesaid, and that plaintiff have such other and further relief as may be just and equitable."

Held, that the complaint was not demurrable on the ground that it did not state facts sufficient to constitute a cause of action;

That the facts stated entitled the plaintiff to some form of legal relief and that the averments seeking equitable relief might be regarded as surplusage;

That while there was force in the criticism that the plaintiff had not sufficiently alleged that he allowed his name to be used in raising the sum of \$21,600, such criticism, even if sound, was not sufficient to support the demurser, as it could not be assumed that the contract was entire in the sense that failure to permit the use of the plaintiff's name defeated his right to any share in the profits, although he performed services for the defendants.

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2. — *Satisfaction of a mortgage, under an agreement by the debtor to pay the debt — action by an assignee of the original creditor to recover an unpaid balance — when it is based on the promise and not on the bond.]* The complaint in an action alleged that the defendant executed and delivered to Samuel I. Acken a bond conditioned for the payment of the sum of \$20,000 with interest; that he executed, as collateral security for the payment of said bond, a mortgage upon certain premises; that thereafter Acken, upon the request of the defendant and upon the defendant's express promise to pay the said sum of \$20,000, satisfied the mortgage; that subsequently the defendant, in pursuance of his promise to pay the \$20,000, paid to Acken \$9,000, leaving a balance still due and owing to Acken of \$11,000 with interest from the 1st day of March, 1901; that no part of this sum had been paid, although frequently demanded; that the said Samuel I. Acken had assigned all his right, title and interest in said sum of \$11,000 with interest to the firm of Samuel I. Acken & Sons, and that said firm had subsequently transferred the claim to the plaintiff.

Held, that the complaint impliedly averred that Samuel I. Acken, upon the express promise of the defendant to pay the indebtedness, relinquished his mortgage security and relied upon the new promise in place of the bond which had been given;

That the action was not upon the original bond, but was upon such new promise, and that the complaint stated facts sufficient to constitute a cause of action. **HOLMES v. ELY**..... 390

3. — *If on the bond the obligee is a necessary party.]* *Sembles*, that if the action had been brought upon the original bond it would have been necessary, such bond not having been assigned, to make Acken a party defendant. *Id.*

4. — *Facts impliedly averred considered on a demurrer — they may be traversed.]* Upon the hearing of a demurrer the pleading demurred to will be held to state all facts that can be implied from the allegations by reasonable and fair intendment; facts so impliedly averred are traversable in the same manner as though directly stated. *Id.*

5. — *An answer required to state definitely whether a contract set up in the complaint is admitted or denied.]* The complaint in an action, brought by the vendee mentioned in a contract for the sale of real estate, to recover from the vendor damages resulting from the alleged inability of the vendor to convey a marketable title, set out the alleged contract in full as an exhibit forming part of the complaint.

The defendant in his answer admitted that he entered into a contract which he believed to be the contract referred to in the complaint, and asked leave to have produced upon the trial the original contract, to which he referred for the terms and provisions thereof, and except as so admitted he denied the allegations of the complaint with respect to the contract.

Held, that the answer was indefinite as to whether the defendant admitted or denied the contract as pleaded in the complaint, and that the plaintiff was entitled to have the answer made definite and certain in this respect.

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6. — *Time to move for such relief where the answer is served by mail.]* Where a pleading is served by mail, the time prescribed by section 22 of the General Rules of Practice for the making of a motion to make it more definite and certain is doubled pursuant to section 798 of the Code of Civil Procedure. *Id.*
7. — *Parol agreement by a person since deceased to will all his property to another — failure to plead the Statute of Frauds.]* Where a party, with whom a parol agreement, by a person since deceased, to will all his property to him, has been made, sets it up as a valid contract in the answer interposed by him in an action brought to partition the real estate of which the deceased died seized and demands specific performance thereof, the other parties to the action, by neglecting to serve a reply to such answer, are not precluded from asserting that the contract was void under the Statute of Frauds.
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8. — *Proof of facts, arising after the bringing of the action, alleged in the pleading.]* The rule that, in an action at law, the rights of the parties must be determined as of the time when the action was commenced, is subject to exceptions, one of which is that where a fact has arisen subsequent to the joinder of issue, which either increases, diminishes or extinguishes the right of recovery, such fact may be proved if the same is set out by appropriate allegations in a supplemental complaint or answer.
INDUSTRIAL & GENERAL TRUST (LTD.) v. TOD 263
9. — *Action on contract — bill of particulars of the instances wherein the defendant claims that the plaintiff did not comply with the contract.]* Where the answer interposed in an action upon a contract denies the plaintiff's allegation of performance, the defendant will not be required to state the particulars of his denial, nor, if he specifies certain instances wherein the plaintiff has failed to comply with the contract, will he be required to furnish the particulars of the instances specified. *BARRETO v. ROTHSCHILD* 211
10. — *Admission in a defense to which a demurrer has been sustained.]* Where a demurrer interposed by the plaintiff to one of the separate defenses set up in the answer has been sustained, the plaintiff cannot avail himself of an alleged admission contained in such defense.
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11. — *It must be considered as a whole.]* If an allegation in a pleading be offered in evidence as an admission by the pleader, the entire allegation must be taken into consideration. *Id.*
12. — *When a demurrer to the complaint is not frivolous.]* A pleading will not be adjudged frivolous unless its insufficiency is apparent from a mere inspection thereof. If argument is required to establish its insufficiency, it is not frivolous. *RANKIN v. BUSH* 181
- Action by the holder of a certificate issued by an insurance association, on behalf of herself and parties similarly situated, to establish her claim, to compel the directors of the association to account for moneys which they had misappropriated, and to procure the removal of the receiver of the association and the appointment of a new receiver — when the complaint states but one cause of action. *POWELL v. HINKLEY* 188
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- Action to establish that a deed executed by a bankrupt while solvent was in trust for his benefit — there must be a written declaration of the trust — failure of the grantee to allege that there was no written declaration thereof. *HILL v. WARSAWSKI* 198
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— Ejectment — the plaintiff in ejectment may show that a deed under which the defendant claims title is fraudulent and void, although he did not plead its invalidity. <i>BABCOCK v. CLARK</i>	119
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<i>See LIBEL.</i>	
— Contract — a party seeking to rescind it must make restitution or allege his willingness to do so. <i>CITY OF IRONWOOD v. WICKES</i>	184
<i>See CONTRACT.</i>	
PLEDGE — Statute of Limitations — when it begins to run in favor of a pledgee] The title to property pledged remains in the pledgor until divested by some sale or by the title being changed in some judicial proceeding, or by the pledgee converting the property to his own use by a sale thereof; in the latter instance the Statute of Limitations begins to run from the time of the actual conversion. <i>BROWN v. BRONSON</i>	313
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PRINCIPAL AND AGENT—*Money given to the secretary of an investment company for a mortgage—liability of the company where the mortgage proves to be a forgery—the fact that the secretary has acted as attorney for the lender in other matters does not relieve the company—plea of ultra vires by the company—company not discharged because the mortgage was given by a third person.]* 1. In an action brought against the Long Island Real Estate Exchange and Investment Company to recover \$1,500, which the plaintiff claimed to have delivered to that corporation to be invested for her on bond and mortgage, it appeared that the defendant maintained an office, on the windows of which the following sign was displayed: “Long Island Real Estate Exchange and Investment Company, Ignatz Martin, President; Sydney H. Carr, Secretary.”

Both Martin and Carr had desks in the office and Carr’s desk stood near a safe marked with the name of the corporation. Carr managed and controlled the business of the corporation.

The plaintiff came to the defendant’s office seeking to invest \$4,000 and was introduced to Carr as the defendant’s secretary. Carr, after talking with Martin, agreed to take \$1,500 and give the plaintiff a mortgage on certain real property owned by the corporation. The plaintiff paid the \$1,500 to Carr in the presence of Martin and received a bond for the money and a receipt signed by Carr, but no mortgage. A week later she again came to the office and Carr told her that they would take the remaining \$2,500 and give her a mortgage upon property owned by a woman named Peters which was controlled by the corporation. The plaintiff paid the \$2,500 in cash to Carr at his desk in the presence of Martin, and Carr placed the money in the safe marked with the corporation’s name. The plaintiff thereupon received a mortgage for \$2,500 executed by Mrs. Peters and also a bond executed by Mrs. Peters and by Carr and Martin individually. No complaint was made in respect to this transaction.

Thereafter Carr informed the plaintiff that the company had lost control of the property proposed as the security for the \$1,500 investment, but that it would substitute other land owned by the company. Martin confirmed the statement and thereafter Carr, Martin and the plaintiff went to view the land. Subsequently the plaintiff was told by Carr in the presence of Martin that one Bender had purchased the land and that he was to give back a mortgage which would be made directly to the plaintiff. A mortgage purporting to have been executed by Bender was then given to the plaintiff in exchange for her receipt for the \$1,500. Payments of interest were made at

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the defendant's office by Carr who took some receipts running to Bender. On one occasion the money for the payment of the interest on both the bond and mortgages was handed to Carr by Martin.

Subsequently it was discovered that Bender was a myth and the mortgage a forgery; that Carr was a thief and that he had never turned over to the defendant the \$1,500.

Held, that the defendant had, so far as the plaintiff was concerned, clothed Carr with apparent authority to receive the \$1,500 for investment and was estopped from denying that it had received the money for that purpose;

That the fact that Carr was an attorney and counselor at law; that under his name on the defendant's sign there appeared in small letters the words "Conveyancer and Examiner of Titles;" that the plaintiff, after becoming acquainted with Carr as the secretary of the defendant, consulted him with reference to other matters than her investments; that she had received interest from Carr by his personal check and signed receipts running to Bender, did not establish that the plaintiff dealt with Carr personally and not in his official capacity;

That the defendant could not be heard to plead as against the plaintiff that the investment which the payment to it contemplated was *ultra vires*;

That the defendant could not successfully urge that, as the plaintiff was told that the property belonged to Bender and as she accepted a bond and mortgage executed directly by Bender to her, she thereby discharged the company and accepted the obligation of Bender.

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2. — *Stockbroker and customer—duplication of orders to sell stock—meaning of words "I will have to let my stocks go"—it is an authorization not a direction—notice of election to exercise it is necessary—ambiguous instructions by a principal to an agent are at the risk of the former—manner of execution of a direction to sell stock—brokers liable for the misconduct of selling agents employed by them.]* In an action against certain stockbrokers, whose place of business was in Chicago and who were represented in New York city by the brokerage house of Van Emburgh & Atterbury, by a customer of such stockbrokers, it appeared that the plaintiff's orders for the purchase and sale of stocks were given by him directly to Van Emburgh & Atterbury, who reported to the defendants at Chicago, by whom notices, etc., thereof were sent to the plaintiff.

It further appeared that defendants were carrying for the account of the plaintiff 2,000 shares of Rock Island, long, 500 shares of Atchison, long, and 500 shares of Rubber preferred, short; that in response to a telegram for more margins the plaintiff, who was at the office of Van Emburgh & Atterbury, telegraphed the defendants, "I will have to let my stocks go;" that the defendants then instructed Van Emburgh & Atterbury to sell 2,000 shares of Rock Island and 500 shares of Atchison, and to buy 500 shares of Rubber preferred, without stating that the transactions were for the plaintiff's account. The plaintiff also gave directly to Van Emburgh & Atterbury two separate orders each to sell 500 shares of Rock Island and a third order to sell 500 shares of Atchison. Upon the transactions being reported to the defendants, the latter, without consulting the plaintiff, instructed Van Emburgh & Atterbury to buy 1,000 shares of Rock Island and 500 shares of Atchison.

Held, that the plaintiff's telegram, "I will have to let my stocks go," authorized the defendants to sell any or all of the plaintiff's stocks which they were carrying for him and to cover the stocks which they had sold for his account;

That if the language of the telegram was ambiguous the principle would apply that instructions from a principal to an agent should be expressed in clear language, and that if the language is not plain and unequivocal, but is fairly susceptible of different interpretations and the agent in fact is misled and adopts and follows one while the principal intended another, then the principal will be bound and the agent will be exonerated;

That such telegram was an authorization and not a direction to sell, and that, until the defendants had notified the plaintiff of their election to exercise the authority contained in the plaintiff's telegram, the plaintiff was at liberty to give orders directly to Van Emburgh & Atterbury;

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That the defendants must, therefore, be regarded as having sold the duplicated stocks for their own account;

That when the plaintiff directed Van Emburgh & Atterbury to sell 500 shares of stock, the defendants did not contract to sell those shares in one block, but in the ordinary manner, viz., in 100-share lots;

That the defendants, although personally innocent, were chargeable with the misconduct of brokers, employed to sell stock for the account of the plaintiff, in selling such stock to themselves. *EVANS v. WRENN*..... 846

8. — *Power of the agent when acting in his own interest to bind his principal.*] The general power or authority of an agent to act for his principal does not embrace a case where it appears from the transaction that the agent is acting in his own interest. Under such circumstances, the agent's authority to bind the principal by his act will not be upheld, unless it appears that he was clothed with such authority by language so plain that no other rational interpretation can be placed upon it. *RANKIN v. BUSH*. 181

4. — *Action upon the bond of a bank cashier who fraudulently certified a check which he used in payment of an individual debt — when a demurrer to the complaint is not frivolous — special damages.*] The complaint in an action brought by the receiver of the Elmira National Bank to recover upon a bond given by one Bush as security for the faithful performance of his duties as cashier of the Elmira National Bank alleged that Bush was indebted in the sum of \$15,012.50 to the Chase National Bank of the city of New York, with which bank the Elmira National Bank had a deposit account; that Bush drew a check on the Elmira National Bank payable to the order of the Chase National Bank for the amount of his indebtedness to the latter bank and fraudulently and illegally certified such check in his capacity as cashier; that the Chase National Bank charged the account of the Elmira National Bank with the amount of the check, but subsequently returned \$7,012.50 thereof. Judgment was demanded for the remaining \$8,000 with interest thereon.

Upon an appeal from an order adjudging a demurrer interposed by the defendants to be frivolous, it was

Held, that at the time the Chase National Bank charged the account of the Elmira National Bank with the amount of the illegally certified check, it had notice of facts which placed it upon inquiry with respect to Bush's authority to certify the check and that, when it assumed to devote the funds of the Elmira National Bank to the payment of the check, it did so at its peril;

That the transaction did not divest the Elmira National Bank of its title to the money on deposit with the Chase National Bank or impair its right to draw upon such money;

That the plaintiff could not recover the damages, if any, which the Elmira National Bank had sustained on account of the refusal of the Chase National Bank to pay over, upon demand, the money withheld by the latter bank, as such damages were special in their nature and had not been pleaded;

That, as it did not appear that the Elmira National Bank had suffered any loss through the action of Bush or of the Chase National Bank, it was questionable whether the complaint was not demurable;

That a pleading will not be adjudged frivolous unless its insufficiency is apparent from a mere inspection thereof; that if argument is required to establish its insufficiency, it is not frivolous;

That it was, therefore, improper to adjudge the demurrer frivolous. *Id.*

5. — *Real estate broker — when his commissions are earned.*] A broker employed to secure a purchaser of real estate, who procures a customer to whom his employer agrees to sell such real estate, is entitled to recover commissions, notwithstanding the fact that thereafter the employer refuses to enter into a formal contract of sale because a building upon the land intended to be conveyed encroaches upon adjoining land. *CUSACK v. AIKMAN*..... 579

6. — *Broker employed to sell real property — when entitled to recover commissions.*] In order to entitle a broker employed to sell real property to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms; he is not entitled to commissions for

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unsuccessful efforts to effect a sale, unless the failure is due to the fault of his employer. <i>SAMPSON v. OTTINGEE</i>	226
7. — <i>Refusal of the customer proposed by the broker to negotiate through him.</i>] Where the broker presents to his employer the name of a customer, and the latter, through no fault of the employer, refuses to enter into any negotiations through the medium of such broker, the broker is not entitled to commissions if the premises are subsequently sold to such customer through the medium of another broker. <i>Id.</i>	
8. — <i>The employer may deal with such customer either personally or through another broker.</i>] The employer violates no right of the broker in negotiating directly with the proposed customer, after the broker has failed to bring such customer to specified terms and has abandoned his efforts in that direction, nor is the employer liable for commissions under such circumstances if his independent negotiations result in a sale. <i>Id.</i>	
9. — <i>Real estate broker — commissions for procuring a loan — producing a party who accepts the application but thereafter refuses to make the loan.</i>] A broker employed to procure a loan upon real estate, who induces a person financially able and otherwise competent to make the loan, to execute a written acceptance of the application for the loan, is not entitled to his commissions, if such person subsequently refuses to make the loan.	
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10. — <i>An agreement signed with the agent's seal does not bind the principal.</i>] An agreement for the sale of real property executed under his seal by the agent of the owners thereof is not binding upon such owners; the agreement being under seal, the agency cannot be shown with respect thereto.	
BLANCHARD <i>v.</i> ARCHER.....	459
11. — <i>Real estate broker — when he earns his commissions on an exchange of real estate.</i>] A broker employed to effect an exchange of real estate earns his commissions when he finds a person ready, able and willing to perform his part of the agreement upon the terms named by the broker's employer. <i>SUYDAM v. HEALY</i>	398
12. — <i>Subsequent refusal of his principal to complete it.</i>] The fact that the employer subsequently refused to enter into a contract of exchange does not affect the broker's right to his commissions. <i>Id.</i>	
13. — <i>Declarations of an agent made after the event.</i>] The negligence of a corporation cannot be established by the declarations of its servants made after the event. <i>BURNS v. BORDEN'S CONDENSED MILK CO</i>	566
— Contract to pay a portion of the profits realized on a sale to the party introducing the purchaser — when an action brought by such party to recover his full share of the entire profits is premature. <i>HART v. GARRETT Co</i>	145
<i>See CONTRACT.</i>	
— An agent of an insurance company may waive a prohibition as to other insurance — the continuation of existing insurance does not constitute "other insurance" — when the question of agency is one of fact.	
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RAILROAD — *Company — liability for a passenger's trunk stolen while in its possession — it is an insurer — burden of proof — the law of the place of delivery governs — statute of New Jersey limiting the liability when notice is posted.]* In an action brought against a railroad corporation to recover damages for the negligent loss of a trunk owned by the plaintiff's assignor, it appeared that the railroad company received the trunk at its station in New York city from an expressman; that the plaintiff's assignor bought a ticket on the defendant's railroad to Roselle, N. J., and that she then went to the baggage room and asked that her trunk be checked to her journey's end. The trunk could not be found, and the plaintiff's assignor, desiring to take a certain train, accepted a check for her trunk on the promise of the baggagemaster to send it on to Roselle. She presented the check at Roselle, but the trunk was not delivered to her, and it subsequently appeared that it had been stolen from the defendant's possession.

Held, that the defendant's obligation with respect to the trunk was that of a common carrier and not of a warehouseman;

That, as a common carrier, it was an insurer of the trunk except against an act of God or of the public enemy;

That the plaintiff made out a *prima facie* case when he showed a demand for the trunk accompanied by a presentation of the check at the place where the defendant undertook to deliver the trunk and the failure of such defendant to comply with such demand;

That the mere proof that the trunk was stolen while in the possession of the defendant did not acquit the latter of negligence;

That the rights of the parties were governed by the law of New Jersey;

That a statute of the State of New Jersey that any railroad company of that State might, by giving notice to persons tendering baggage to it, limit its liability as a carrier of such baggage to \$100 for each hundred weight of such baggage, unless such person should pay an additional charge, and that "a general notice of the limitation of such company's responsibility, placed in a conspicuous place, at or in the receiving office of such company, where goods, merchandise or baggage are usually received by them for transportation, and inserted in the bills of lading or receipts given for such goods or merchandise, and in the tickets delivered to passengers, shall be deemed sufficient notice under this section," did not apply;

That, assuming that the statute did apply, the provision therein for a general notice to persons tendering baggage was insufficient;

That, as the evidence showing compliance with the provision of the statute requiring the posting of the notice prescribed therein was given by employees of the defendant, who were chargeable with the performance of that duty, it was proper for the court, although the evidence given by those witnesses was not contradicted, to submit the question of compliance with the statute to the jury, as the interest of the witnesses in establishing that they had performed the duty incumbent upon them, was sufficient to make their credibility a question for the jury.

What notice, assuming that it might be given in the manner specified in the statute, was sufficient, considered.

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— *Conspiracy — refusal of railroad companies to handle grain from an independent elevator on the same terms as grain from elevators controlled*

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by an elevator association — it is unlawful — the railroad company and the elevator association are liable to the owners of the independent elevator for the damages sustained by them. <i>KELLOGG v. SOWERBY</i>	124
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— Agreement by a second mortgagee to bid in the mortgaged property for the benefit of the mortgagor at a foreclosure sale under the first mortgage — it does not impose an obligation to complete the sale by paying the amount of the bid and to hold the title for the mortgagor's benefit — its effect on a second sale — effect of letters written between the parties — no confidential relation creating a trust ex maleficio.	
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— Will directing the executors thereof to pay a mortgage upon property in which the testator's son has a life estate — purchase of the property by the executors upon a foreclosure of the mortgage — when they acquired a good title as against judgment creditors of the son who were parties to the foreclosure action.	
<i>See MARSHALL v. UNITED STATES TRUST CO</i>	252
— Parol agreement by a person since deceased to will all his property to another — when it will be enforced — the agreement is void under the Statute of Frauds — when the rendition of services thereunder will not justify the court in decreeing specific performance — failure to plead the statute.	
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— Contract for the sale of land — where the price is fixed by the acreage, it is determined by the actual, not the paper acreage — the admission of proof as to the paper acreage by one party entitles the other to give like proof.	
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RECEIVER — Action by the holder of a certificate issued by an insurance association, on behalf of herself and parties similarly situated, to establish her claim, to compel the directors of the association to account for moneys which they had misappropriated, and to procure the removal of the receiver of the association and the appointment of a new receiver — when the complaint states but one cause of action. <i>POWELL v. HINKLEY</i>	188
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— Complaint to recover one-half the profits of a business under an agreement for the use of plaintiff's services and name — not demurrable because it asks for an accounting and receiver — the demand for equitable relief regarded as surplusage. <i>GILLESPIE v. MONTGOMERY</i>	408
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At the time of the sale the vendor knew that the property was to be placed in the building and that the vendees were not the owners thereof. The owners of the building had no notice of the conditional sale and in no wise assented that the title to the heating apparatus should remain in the vendor after its installation in the building.

There was no proof that the owners of the building did not intend to install the boilers and appurtenances as a permanent accession to the realty or assented to their remaining personal property.

After the installation of the boilers and heater, the building was sold upon a mortgage foreclosure sale to a purchaser who had no knowledge of the conditional sale.

Held, that as between the vendor of the boilers and heater and a person who purchased the building at a mortgage foreclosure sale, the title to the boilers and heater passed to such purchaser as a part of the realty;

That even if the vendor of the boilers and heater was entitled to recover possession of them from the purchaser at the foreclosure sale, he could not recover damages for the depreciation in the value of the property, unless such damages were pleaded in the complaint. *JERMYN v. HUNTER.* 175

2. — *Evidence that the owner intended the fixtures to become a part of the realty.*] The actual annexation of fixtures to the realty with the purpose of using them in connection with such realty, furnishes, in the absence of proof to the contrary, evidence that the owners intended to make the fixtures a permanent accession to the real property. *Id.*

3. — *Sale on credit induced by false representations to a commercial agency.*] Where the president and treasurer of a corporation makes false and fraudu-

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|-------|--|
| 1 | lent statements concerning the financial condition of the corporation to a commercial agency, with knowledge of their falsity, for the purpose of having such statements reported to the subscribers of the commercial agency and of securing credit from such subscribers, a subscriber of the commercial agency, who, in reliance upon such false and fraudulent statements reported to him by the agency, sells goods to such corporation on credit and is not paid therefor, may, although no false representations were made by the president of the corporation directly to him, rescind the sale of the goods on the ground of fraud. <i>PIER BROTHERS v. DOHENY</i> |
| 1 | 4. — <i>That the vendee intended to pay for the goods does not disprove fraud.</i>] The fact that the president of the corporation believed at the time of the purchase that the corporation could and would pay for the goods will not sustain a finding that no fraud was committed. <i>Id.</i> |
| 1 | 5. — <i>When a finding that the vendee did not intend to pay for the goods is necessary.</i>] While a finding that the purchase was made with a design not to pay for the goods might be necessary where there were no false representations, but merely a failure to disclose a condition of insolvency, such a finding is not required where false representations are made and relied upon and damage results therefrom. <i>Id.</i> |
| 809 | 6. — <i>Contract of sale of merchandise "F. O. B. New York City"—a delivery to a carrier, with direction to deliver it to the vendee at Baltimore, Md., and collect charges, is not a compliance therewith.</i>] Where a contract for the sale of merchandise provides that delivery should be made "F. O. B. New York City," the delivery of the merchandise to an express company at New York city, with directions to deliver it to the vendee at its place of business in Baltimore, Md., the cost of carriage to be there collected, is insufficient to pass the title of the merchandise to the vendee, as the vendor cannot bind the vendee by a tender of the merchandise at a place different from that specified in the contract, nor annex to the tender the burden or condition of paying the carrying charges. |
| 820 | <i>INTERNATIONAL MONEY CO. v. SOUTHERN CO.</i> |
| 820 | 7. — <i>Effect of a repudiation of the contract.</i>] The repudiation of the contract by the vendee obviates the necessity for a tender of the goods. <i>Id.</i> |
| 820 | 8. — <i>Rescission of a sale to a partnership, induced by fraud—an action for damages is maintainable against the partner guilty of the fraud.</i>] Where goods are sold to a firm in reliance upon fraudulent representations made by a member of the firm as to its financial condition, if the purchaser elects to rescind the sale because of such fraudulent representations, and replevies a portion of the goods, he may maintain an action to recover the damages sustained by him in consequence of the fraud against the partner who made such false representations without joining the other partners. |
| 820 | <i>HYDE & SONS v. LESSER</i> |
| 820 | 9. — <i>Proper parties to an action to enforce the contract.</i>] If he brings the action to enforce the contract of sale, he is obliged to join all of the partners. <i>Id.</i> |
| 820 | 10. — <i>His discharge in bankruptcy is no defense.</i>] The vendor's right of action against the partner who made the fraudulent representations is not affected by a discharge in bankruptcy obtained by such partner subsequent to the sale. |
| 820 | The words "in any fiduciary capacity," used in section 17 of the Federal Bankruptcy Act, which provides "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer, or in any fiduciary capacity," do not qualify the words "fraud" or "embezzlement," or "misappropriation" but simply the word "defalcation." <i>Id.</i> |
| 820 | 11. — <i>Sale of goods on credit induced by false representations.</i>] A person who sells goods to a corporation upon credit, in reliance upon false and fraudulent statements concerning the financial condition of the corporation, made to him by the president and treasurer of the corporation with |

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knowledge that such representations were false, may, if he does not receive payment for the goods at the expiration of the term of credit, rescind the sale upon the ground of fraud. *FITCHARD v. DOHENY* 9

12. — *The fact that the vendee believed on reasonable grounds that he could pay for the goods does not disprove fraud.]* The fact that the president of the corporation believed, and had reasonable grounds for such belief, that the corporation would pay for such goods when the term of credit expired, will not sustain a finding that no fraud was committed. *Id.*

18. — *When a finding that the vendee did not intend to pay for the goods is immaterial.]* While a finding that the purchase was made with the intention not to pay for the goods might be necessary where there were no false representations, but merely a failure to disclose a condition of insolvency, such a finding is not required where false representations are made and relied upon and damage results therefrom. *Id.*

— Bond given by a pharmacist to obtain a liquor tax certificate — sale by the pharmacist's clerk of liquor without a physician's prescription in violation of his master's instructions — it will sustain an action on the bond — such an action is one on contract, not one to recover a penalty.

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— Contract to pay a portion of the profits realized on a sale to the party introducing the purchaser — when an action brought by such party to recover his full share of the entire profits is premature.

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— 1881, chap. 326 — *City of New York — it is not liable upon certificates of indebtedness issued by the Flushing avenue improvement commission.*

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— 1884, chap. 300 — *City of New York — it is not liable upon certificates of indebtedness issued by the Flushing avenue improvement commission.*

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— 1888, chap. 588, tit. 2, § 12, tit. 19, § 19, tit. 22, § 22 — *Power of a municipality over its streets — franchisees therein — grant by the common council of Brooklyn of the right to lay pipes in the streets to supply ammonia gas for*

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— 1890, chap. 566, § 68—Gas company—liability of, where its servant breaks a cellar door in order to remove a meter—express direction by the gas company need not be shown—act done within scope of employment—punitive damages not allowed—what considered in determining the damages—verdict of \$150 not excessive. <i>See REED v. NEW YORK & RICHMOND GAS CO.</i>	458
— 1892, chap. 182, § 122—Mount Vernon—employment of men to aid in the construction of a sewage disposal plant—they must be existing employees of the commissioner of public works. <i>See DRUMHELLER v. CITY OF MOUNT VERNON</i>	596
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SLANDER — *Charge of dishonesty.*] 1. An oral charge of dishonesty is not slanderous *per se* and will not support an action for slander, unless it relates to the plaintiff in a special character or occasions special damage.

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2. — *It is not actionable per se unless spoken in reference to the person's occupation or business.*] Consequently, where the complaint in an action of slander based on such an accusation contains no allegation that the words in question were spoken of the plaintiff in reference to any occupation or business, or that the plaintiff had any occupation or was engaged in any business, the complaint is demurrable. *Id.*

3. — *Nor is a charge that a man lived with an adopted daughter and left his wife alone, or that an acquaintance would be sorry that she ever met him.*] Oral statements that a man was accustomed to live with his adopted daughter for periods of a week at a time, leaving his wife at home alone, and that a woman acquaintance would be sorry that she ever met him, are not actionable *per se*, and a complaint in an action of slander based upon such statements is demurrable where it contains no averment that they were uttered in reference to the plaintiff's calling or that they affected him in his business character. *Id.*

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SURROGATE — Testamentary trustee — a decree on an intermediate accounting is final on the question whether a dividend should be credited to income or principal.] 1. Decrees approving the accounts filed by a testamentary trustee from time to time, by which accounts it appears that certain dividends received by the trustee were treated, not as principal, but as a part of the income of the trust fund and were paid over to the life beneficiaries, are, while they remain in force, conclusive against the parties to the accountings, and also against a remainderman who was not in being at the time the accountings were had, notwithstanding that on a subsequent accounting it is adjudged that the dividends in question should have been treated as principal.	
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2. — <i>Refusal of the trustee to bring suit to correct an error in such credit.]</i> The refusal of the trustee, after the rendition of the last-mentioned decree, to bring suit to recover from the life beneficiaries the dividends paid to them, although he was requested to bring such suit by a life beneficiary who offered to return the dividends which she had received, does not render the trustee guilty of a devastavit. <i>Id.</i>	
3. — <i>Decree refusing to admit an alleged will to probate — the executor nominated therein may appeal.]</i> A person nominated as executor in an instrument offered for probate as a last will and testament is a party aggrieved by a decree of the surrogate denying probate to such instrument, and is, therefore, entitled to appeal to the Appellate Division from such decree.	
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4. — <i>Probate of will — a jury trial will be ordered where the surrogate's determination is unsatisfactory.]</i> Where the action of a Surrogate's Court in passing upon an application for the probate of a will is not entirely satisfactory to the Appellate Division, that court will send the issues of fact upon which the right to probate depends to a jury for determination.	
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TAX — Transfer tax — refunding of money by the State Comptroller — when an application therefor is not barred by the Statute of Limitations — the Code provisions are not applicable — the reversal of the tax may be by the surrogate.] 1. November 29, 1895, when the Transfer Tax Law (Laws of 1895, chap. 399) was in force, an executor paid, under the compulsion of an order of the Surrogate's Court, a transfer tax amounting to \$660 upon property which was exempt from taxation.

Section 6 of the Transfer Tax Law provided that it should be lawful for the State Comptroller, upon proof that any portion of a tax had been paid erroneously, to require it to be refunded, providing, however, that all applications for such refunding should be made within five years from the payment of the tax. This provision was incorporated, without change, in section 225 of the Tax Law (Laws of 1896, chap. 908) which revised the Transfer Tax Law.

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In 1897, by chapter 284 of that year, section 225 of the Tax Law was amended so as to read as follows: "If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed, on due notice to the Comptroller of the State, the State Comptroller shall, by order, direct and allow the treasurer of the county, or the comptroller of the city of New York, to refund to the executor, administrator, trustee, person or persons, by whom such tax had been paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, * * *; but no application for such refund shall be made after one year from such reversal or modification."

By chapter 382 of the Laws of 1900, section 225 of the Tax Law was further amended so as to provide for the refunding by an order of the State Comptroller of transfer taxes erroneously paid, if the order was modified or reversed within two years from and after the date of the entry of the order fixing the tax.

Held, that an application by the executors, in October, 1903, for an order vacating the order fixing the transfer tax and directing the State Comptroller to refund the tax erroneously paid, was not barred by the Statute of Limitations.

That the only limitation contained in section 225 of the Tax Law, as amended in 1897, related to the application to the Comptroller for the refunding of the tax after the order fixing the tax had been reversed or modified, and that it did not limit the time when the modification or reversal of the surrogate's order must be procured;

That the reversal or modification contemplated by the section, as amended in 1897, need not be by the action of an appellate tribunal, but might be made by the surrogate himself;

That section 225, as amended by the act of 1900 could not be given a retroactive effect, as, if the amendment should be deemed to create a Statute of Limitations, such construction would deprive of all redress those persons from whom payment of an illegal transfer tax had been forcibly exacted, who had delayed proceedings to procure the repayment of the same in reliance upon pre-existing legislation;

That the statutes of limitations prescribed by sections 380, 382 and 414 of the Code of Civil Procedure were not applicable to the remedies provided by section 225 of the Tax Law for procuring the repayment of a void tax;

That the Tax Law contains within itself all the limitations affecting the duty and liability of the State Comptroller to make restitution of transfers illegally imposed. MATTER OF HOOPLE.

Table 1. Summary of the main characteristics of the four groups of patients.

[The Brooklyn Masonic Guild is not exempt from taxation.] The act incorporating the Brooklyn Masonic Guild provides, "the said corporation is formed and hereby authorized to acquire, construct, maintain and manage a hall, temple, or other building within the borough of Brooklyn, New York city, for the use of masonic bodies and other fraternal associations and benevolent organizations, and for social, benevolent and charitable purposes, and generally to promote and cherish the spirit of brotherhood among the members thereof."

The act also gives the corporation the powers and subjects it to the liabilities given and imposed by the General Corporation Law (Laws of 1892, chap. 687, as amended) so far as the same are not inconsistent with the act of incorporation.

Subdivision 7 of section 4 of the Tax Law (Laws of 1896, chap. 908, as amd. by Laws of 1897, chap. 371) provides: "The real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation," and that "no such corporation or association shall be entitled to any such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or

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more of such purposes, or as proper beneficiaries of its strictly charitable purposes."

Held, that the corporation did not come within subdivision 7 of section 4 of the Tax Law, as, under its charter, it might use its property for other purposes than those mentioned in the subdivision, and for the further reason that it did not appear that the association might not lawfully give to its officers, members or employees the pecuniary profit prohibited by said subdivision;

That a statement that "no officer, member or employee thereof receives or is entitled to receive any pecuniary profit from the operations thereof," did not bring the case within that portion of subdivision 7 providing that such persons should not be "lawfully entitled to receive" any such profits.

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3. — *A legacy to a corporation exempt from taxation is subject to tax while in the hands of the executor.]* Under section 2721 of the Code of Civil Procedure, providing that an executor shall retain the testator's personal property in his hands for the period of one year from the time when the letters testamentary were granted, and section 8 of the Tax Law providing: "Every person shall be taxed in the tax district where he resides when the assessment for taxation is made for all personal property owned by him or under his control as agent, trustee, guardian, executor or administrator," an executor, during such year, is taxable upon the testator's personal property in his hands, although such personal property has been bequeathed by the will to a corporation whose personal property is exempt from taxation. *Id.*

4. — *An assessment against an "executor and trustee" is valid against the executor where the will creates no trust.]* The fact that the assessment is in form against the "executor and trustee," and that the will, although it referred to the testator's appointees as "executors and trustees," did not, in fact, create a trust, does not invalidate the assessment, particularly where this objection is urged only as to a portion of the assessment. *Id.*

5. — *Transfer tax—estates in expectancy transferred since 1899 are presently taxable—the amendment of section 280 of the Tax Law made in 1901 applies only to estates in expectancy transferred prior to 1899.]* Section 280 of the Tax Law (Laws of 1898, chap. 908, as amd. by Laws of 1897, chap. 284) provided: "Estates in expectancy which are contingent or defeasible shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof."

The section was amended by chapter 76 of the Laws of 1899 by omitting the provision above quoted and inserting in place thereof the following: "Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. * * * When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith out of the property transferred."

By chapters 178 and 498 of the Laws of 1901 the section was amended by inserting therein, after the provision last quoted, the following: "Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof."

Held, that, by the amendment of 1901, the Legislature did not intend to change the general policy of making estates in expectancy presently taxable;

That the application of the clause inserted in the section by the amendment of 1901 was limited by the words, "and in which proceedings for the determination of the tax have not been taken or where the taxation thereof

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has been held in abeyance," to cases in which transfers of estates in expectancy had occurred prior to 1899 and in which no proceedings had been taken to determine the tax. MATTER OF KENNEDY.	27
6. — <i>Appeal from a surrogate's decree fixing a transfer tax — scope of the review by the Appellate Division.] Under section 232 of the Tax Law, as amended by chapter 178 of the Laws of 1901, which provides that the notice of appeal to a surrogate from a determination fixing the amount of a transfer tax, shall state the grounds upon which the appeal is taken, the Appellate Division is confined to a consideration of those grounds upon an appeal from the surrogate's decree. Id.</i>	
7. — <i>Taxation of corporations — the assessors cannot disregard an unimpeached verified statement filed by the corporation — certiorari to review an assessment.] Where a corporation, assessed for the purposes of taxation by the commissioners of taxes and assessments of the city of New York, applies for a reduction of its assessment and files with the tax commissioners a verified statement showing its financial condition, if the commissioners are not satisfied with such statement, they may require further information from the corporation; if, however, they neglect to do so, they may not disregard the statement simply because they believe, without any other grounds for such belief than their mere surmise, that it is untrue.</i>	
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8. — <i>Where the return raises an issue of fact, testimony must be taken.] Where an issue of fact is raised by the petition for, and the return to, a writ of certiorari obtained by the corporation to review the action of the commissioners in refusing to reduce the amount of the assessment to the sum shown by the statement, it is the duty of the court to take testimony upon such issue or send the matter to a referee for that purpose. Id.</i>	
9. — <i>What return does not raise an issue of fact.] Where, however, the return denies that the assessment is illegal, erroneous or unequal, but does not deny the facts set forth in the petition, such denials are mere conclusions which do not raise any issue of fact, and the Special Term may properly grant a reduction of the assessment and need not take or direct the taking of testimony. Id.</i>	
— <i>Cases arising under the Liquor Tax Law.</i> <i>See INTOXICATING LIQUOR.</i>	
TAXPAYER — Patented articles — action of New York city in inviting proposals therefor — when "a fair and reasonable opportunity for competition" is not afforded — injunction by a taxpayer. <i>See KAY v. MONROE.</i>	484
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TOWN — Bonding of — the petition to the supervisors must be in the form required by the statute in existence at the time it is to be acted upon by the supervisors — chapter 469 of the Laws of 1903 is not retrospective.] October 6, 1902, the town board of a town and the commissioner of highways thereof presented a petition to the board of supervisors of the county pursuant to the	

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provisions of section 69 of the County Law (Laws of 1892, chap. 686, as amd. by Laws of 1900, chap. 12), for leave to issue bonds for highway purposes.

The petition was granted by a resolution of the board of supervisors passed June 1, 1908, and the bonds were subsequently issued and sold.

May 7, 1908, chapter 469 of the Laws of 1908, which amended section 69 of the County Law by providing that the petition to issue bonds for highway purposes should have the sanction of the vote of a majority of the electors of the town, and that it should contain a written estimate of the expense of the highway improvement, went into effect.

The petition acted upon by the board of supervisors did not comply with these requirements of the act of 1908.

Held, that the bonds were invalid;

That it could not be successfully urged that, as the town had taken action under the law as it existed prior to May 7, 1908, the jurisdiction of the board of supervisors was not affected by the amendment of the statute, under the provisions of section 81 of the Statutory Construction Law (Laws of 1892, chap. 677), which provides that the "repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect."

That the act of 1908 was not retrospective, either as to the board of supervisors or the town. *WEBSTER v. TOWN OF WHITE PLAINS*..... 398

TRANSFER TAX:

See TAX.

TRESPASS — *Gas company — liability of, where its servant breaks a cellar door in order to remove a meter.]* 1. Where a gas company, entitled under section 68 of the Transportation Corporations Law (Laws of 1890, chap. 586) to enter upon a consumer's premises for the purpose of removing a gas meter therefrom, breaks open a cellar door in effecting such entry, it becomes a trespasser *ab initio*. *REED v. NEW YORK & RICHMOND GAS CO.*.. 458

2. — *Express direction by the gas company need not be shown.]* Where it appears that the gas company issued an order to its servants to collect a specified sum of money from the consumer or to remove the meter, and that such order was returned to it with a statement that the meter had been removed, the gas company is liable for the trespass, even though it gave no express directions to its servants to break open the door in order to effect the removal. *Id.*

3. — *Punitive damages not allowed.]* In such a case the consumer is not entitled to recover punitive damages, in the absence of any evidence that the gas company authorized or ratified its servants' acts, or that the trespass was committed after the unfitness of the servants had become known to the gas company. *Id.*

4. — *What considered in determining the damages.]* The consumer may, however, recover from the gas company compensatory damages, which damages involve a determination as to the extent of the injury, insult, invasion of the privacy and interference with the comfort of the consumer and his family. *Id.*

5. — *Verdict of \$150 not excessive.]* The Appellate Division will not set aside, as excessive, a verdict of \$150 rendered in favor of the consumer, although the actual damages to the cellar door which was broken open were merely nominal. *Id.*

TRIAL — *Appeal from an order setting aside a verdict — exception to the admission of incompetent evidence — when not available on a motion to set aside the verdict — the Appellate Division may examine the opinion of the trial judge — statement therein that the verdict was set aside as a matter of discretion.*

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TRUNK:

See BAGGAGE.

TRUST — Action to establish that a deed executed by a bankrupt while solvent was in trust for his benefit — there must be a written declaration of the trust.] 1. A trustee in bankruptcy cannot maintain an action to compel the conveyance to him of certain land which the bankrupt, four years before the adjudication in bankruptcy, while entirely solvent, conveyed to her daughter upon an alleged oral agreement that the beneficial interest in the lands conveyed should remain in the bankrupt, and that she should be entitled to a reconveyance thereof upon demand, unless he is able to produce the written declaration of the trust required by section 207 of the Real Property Law (Laws of 1896, chap. 547). HILL v. WARSAWSKI.....	198
2. — Failure of the grantee to allege that there was no written declaration thereof.] Where the grantee denies the existence of the alleged trust, it is incumbent upon the trustee to establish the existence of the trust in the manner provided by statute, namely, by a written declaration of trust; the fact that the grantee did not expressly plead that no written declaration of the trust had been executed does not entitle the trustee in bankruptcy to maintain the action upon making proof of the parol agreement. <i>Id.</i>	
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VACATION — *Of a judgment — when granted and upon what terms.*
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VENDOR AND PURCHASER — *Deed absolute in form, executed as security for a debt — agreement by the grantees to reconvey the land within one year on repayment of the debt — execution by the grantor to the grantees of a general release — the grantor cannot subsequently maintain an action to redeem the premises.]* 1. November 25, 1873, Theresa Luesenhop conveyed certain real estate to John P. Einstfeld. The conveyance, although absolute on its face, was given as security for an indebtedness of \$1,000, and concurrently with its execution Einstfeld and his wife executed an agreement by which they agreed to reconvey the property one year from the date of the agreement or sooner, provided the said Luesenhop paid the indebtedness. The agreement further provided that Luesenhop should have the occupancy of the premises during the term, and that she should pay the taxes and insurance and make all necessary repairs to the buildings on the premises.

In November, 1874, Einstfeld without, so far as appeared, making any special agreement with Luesenhop, entered into possession of the premises. He continued in such possession, claiming to own the property, paid off the incumbrances which were liens against the property amounting to upwards of \$3,000, paid all the expense of repairs and maintenance, and generally exercised all the rights and discharged all the obligations of an owner.

In 1886 negotiations were had between Einstfeld and Luesenhop, which resulted in the payment to her by Einstfeld of the sum of \$1,500, and the execution by her to Einstfeld of a release by which she discharged the said Einstfeld from all claims "in law or in equity," and from all "manner of * * * claims * * * upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these presents."

At the time of the execution of the release, Einstfeld claimed to be the absolute owner of the property, and the only matters in dispute between the parties were the claims growing out of the conveyance of the property.

Thereafter Einstfeld made valuable improvements upon the premises and paid the taxes and insurance. He continued in possession until his death in 1891. In 1893 Luesenhop brought an action against Einstfeld's executor and devisees to compel an accounting with respect to the premises and a reconveyance of the premises upon payment of the sum found due.

Held, that the plaintiff was not entitled to the relief sought;

That there was an entire lack of equity in the plaintiff's case;

That the release executed by the plaintiff to Einstfeld operated to extinguish whatever rights the plaintiff had in the premises;

That the fact that Einstfeld and his successors had upon the faith of the release incurred expense in maintaining and improving the premises, and could not be placed in the situation in which they were before the release was executed, was fatal to the plaintiff's right to demand a reconveyance.

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2. — *Such a conveyance is not invariably a mortgage — the parties may agree that if the debt is not repaid within the specified time the grantee's title shall become absolute.]* Semble, that every agreement to reconvey upon the payment of a certain sum within a specified time does not constitute a mortgage, and that the parties may execute such conveyance with the intention that the title shall become absolute, and the right of redemption determine, upon default after the expiration of the time for payment, and that if such intention actually appears full effect will be given to it; that, in the absence of such intention appearing, equity would construe the transaction as a mortgage with the right to redeem. *Id.*

3. — *Contract for the sale of land — where the price is fixed by the acreage, it is determined by the actual, not the paper acreage.]* Where a contract provides that the sum of twenty-five dollars an acre shall be paid for a tract

VENDOR AND PURCHASER — <i>Continued.</i>	PAGE.
of land described by metes and bounds, as "containing four hundred and ten acres more or less," the actual acreage and not the paper acreage governs. <i>WARDEN v. TESLA</i>	520
4. — <i>The admission of proof as to the paper acreage by one party entitles the other to give like proof.]</i> Where, however, a party claiming under the contract is permitted to give evidence of the paper acreage, a refusal to allow his adversary to give similar evidence is improper. <i>Id.</i>	
— Purchase of premises at a foreclosure sale by the guardian in socage of the infant owner — it is voidable by the infant — she need not wait until she has obtained her majority to disaffirm it — Statute of Limitations — <i>bona fide</i> purchasers from the guardian in socage are protected — notice to such purchasers — facts appearing in the judgment roll in the foreclosure action — purchaser's duty as to the examination of title. <i>CANILL v. SEITZ</i>	105
<i>See GUARDIAN AND WARD.</i>	
— Agreement by a second mortgagee to bid in the mortgaged property for the benefit of the mortgagor at a foreclosure sale under the first mortgage — it does not impose an obligation to complete the sale by paying the amount of the bid and to hold the title for the mortgagor's benefit — its effect on a second sale — effect of letters written between the parties — no confidential relation creating a trust <i>ex maleficio</i> . <i>MACKALL v. OLcott</i>	282
<i>See CONTRACT.</i>	
— Installation in a building of heating apparatus purchased by a contractor under a contract of conditional sale — when, as against the vendor of the heating apparatus, the title thereto passes to a purchaser of the building — damages for depreciation in the value of the heating apparatus — evidence that the owner intended the fixtures to become a part of the realty.	
<i>JERMYN v. HUNTER</i>	175
<i>See SALE.</i>	
— Will directing the executors thereof to pay a mortgage upon property in which the testator's son has a life estate — purchase of the property by the executors upon a foreclosure of the mortgage — when they acquired a good title as against judgment creditors of the son who were parties to the foreclosure action. <i>MARSHALL v. UNITED STATES TRUST CO</i>	253
<i>See EXECUTOR AND ADMINISTRATOR.</i>	
— Motion by a purchaser to be relieved from a purchase at a mortgage foreclosure sale — what deed is not an exercise of a power of sale — a deed and declarations made by a widow and children, insufficient where there are contingent remainders. <i>HUBER v. CASE</i>	479
<i>See MORTGAGE.</i>	
— Action to establish that a deed executed by a bankrupt while solvent was in trust for his benefit — there must be a written declaration of the trust — failure of the grantee to allege that there was no written declaration thereof. <i>HILL v. WARSAWSKI</i>	198
<i>See TRUST.</i>	
— A deed executed by one of two executors having a power of sale is void — when a party claiming under such a deed acquires a good title under the Statute of Limitations — an estate for life in a beneficiary entitled to the possession distinguished. <i>BROWN v. DOHERTY</i>	190
<i>See DEED.</i>	
— Agreement by a grantee of premises to pay for lumber used upon the premises — consideration — when the person supplying the lumber may enforce such agreement. <i>HURD v. WING</i>	62
<i>See CONTRACT.</i>	
— Easement created by grant — not destroyed by non-user — it may be by adverse user. <i>ANDRUS v. NATIONAL SUGAR REFINING CO</i>	377
<i>See EASEMENT.</i>	
— Sales of personal property.	
<i>See SALE.</i>	
VILLAGE:	
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VOLUNTARY PAYMENT:*See PAYMENT.***WARD:***See GUARDIAN AND WARD.***WARRANTY — *Covenant of.****See COVENANT.*— *In an insurance policy.**See INSURANCE.***PAGE.****WATERCOURSE** — Adverse possession — piles driven, but not used, do not constitute a substantial inclosure.

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*See ADVERSE POSSESSION.***WATER SUPPLY — *Of a village.****See MUNICIPAL CORPORATION.***WHARF** — New York city — charge for the use of a wharf for the first twenty-four hours — implied contract.

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See MUNICIPAL CORPORATION.

— Adverse possession — piles driven, but not used, do not constitute a substantial inclosure. FORTIER v. DELAWARE, L. & W. R. R. Co..... 24

*See ADVERSE POSSESSION.***WHITE PLAINS** — *The control of the water system is given to the water commissioners — not to the village trustees — the duty of the latter is confined to providing money for its maintenance — authority of the court over public officers.**See PEOPLE EX REL. HUSTED v. BOARD OF TRUSTEES..... 599***WIFE:***See HUSBAND AND WIFE.***WILL** — *Bequest of securities to be divided among the legatees in definite proportions — the executor is entitled to commissions thereon.]* 1. Where a testator, by his will, bequeaths the contents of a safe deposit box, which consist of stocks, bonds, mortgages and life insurance policies, to eleven persons, in the proportion of one-twelfth to ten of such persons and the remaining two-twelfths to the other one of such persons, and the value of the respective securities is unequal, thus making it impossible to divide them into twelfths for the purpose of delivery to the respective legatees, the bequest is a general legacy and not a specific legacy and the executor is entitled to commissions for the services rendered by him in selling the securities and distributing the proceeds. MATTER OF FISHER..... 1862. — *The securities must bear their proportionate share of such commissions.]* Such commissions should not be charged upon the residuary estate alone, but should be borne proportionately by the securities included in the bequest. *Id.*3. — *An executor is not entitled to commissions on a specific legacy.]* An executor is not entitled to commissions for making delivery of the subject of a specific bequest to the legatee. *Id.*

— Will directing the executors thereof to pay a mortgage upon property in which the testator's son has a life estate — purchase of the property by the executors upon a foreclosure of the mortgage — when they acquired a good title as against judgment creditors of the son who were parties to the foreclosure action. MARSHALL v. UNITED STATES TRUST Co..... 252

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— Equitable cause of action in a life tenant against executors who hold possession of the premises in which the life tenure exists.

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— Surrogate — decree refusing to admit an alleged will to probate — the executor nominated therein may appeal. MATTER OF RAYNER..... 114

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—*Admissibility of an affidavit made by a witness as to what another witness had said to him.*

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—*Examination of, before trial.*

See DEPOSITION.

WRIT OF INQUIRY—*Issued in an action to recover damages for personal injuries.]* 1. Where, upon a default by the defendant in an action to recover damages for personal injuries sustained by the plaintiff, a writ of inquiry is issued to the sheriff of the county to assess the plaintiff's damages, the manner in which the writ shall be executed rests in the discretion of the court.

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2. —*The court may, in its discretion, direct that it be executed before a judge and a jury drawn from the regular panel.]* If troublesome questions of law are likely to arise, the court may direct that the sheriff attend at the courthouse on a specified day; that the writ be executed in open court, the judge presiding, and that the jury to ascertain the damages be drawn from the panel of jurors then in attendance at a regular Trial Term of the court.

The court is not obliged to direct that the writ of inquiry be executed by the sheriff as the presiding officer and by a jury chosen by him. *Id.*

WRITTEN EVIDENCE:

See EVIDENCE.

WRITTEN INSTRUMENT—*Parol evidence to vary.*

See EVIDENCE.

WRONG—Conspiracy—*refusal of railroad companies to handle grain from an independent elevator on the same terms as grain from elevators controlled by an elevator association—it is unlawful—the railroad company and the elevator association are liable to the owners of the independent elevator for the damages sustained by them.*

See KELLOGG v. SOWERBY 124

—*Release of one tortfeasor, excepting the liability of others—it is in effect a covenant not to sue.*

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